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THE LAW  
OF THE  
MASTER'S LIABILITY  
FOR  
INJURIES TO SERVANT

  
By W. F. BAILEY

One of the Judges of the Circuit Court of Wisconsin

ST. PAUL, MINN.  
WEST PUBLISHING CO.

1894



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## PREFACE.

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There is no branch of the law so fraught with perplexities to the practitioner as that which has been made the subject of this treatise. The difficulties are twofold: One, to ascertain what the law is; the other, where to find it. The law is largely what may not be inaptly termed "judge-made law." It had its origin in the expressions of a learned judge. Those expressions were adopted as rules. They have been made the subject of discussion and construction by courts everywhere. Courts of the several jurisdictions have arbitrarily adopted constructions peculiarly their own, resulting in widest, and it might be said most unpardonable, differences and distinctions. Such want of uniformity has produced confusion, uncertainty, and probably injustice. The statement of the general rule, in most respects, is but a meaningless expression; certainly, an incomplete one. It conveys but little, if any, knowledge of the law in particular courts or states. The practitioner is forced to examine and review the decisions of a particular jurisdiction, if he would learn the law of that jurisdiction, and, if able to find it, he too often finds it is valueless for use in another. To add to his confusion, he will find the same courts, in their efforts to apply the general rule, have not always been consistent. Largely, this is a result of the influence of decisions of other courts; to some extent the result of

sentiment; and also, in some measure, the result of a lack of a thorough understanding of the exact principles upon which other decisions were predicated.

To review the many decisions of a state upon the subject, and extract therefrom rules or principles, is a work requiring much time and considerable mental effort. First of all, the decisions which are apparently conflicting (and there are many such) must, if possible, be reconciled. Unless familiar with the general subject, there is much that will escape his attention. The courts have often indulged in such nice refinements that a distinction is not always plain or readily noticed. To properly prepare and present his case, oftentimes he is forced to apply precedents from other courts. His difficulties are thus increased. Whether applicable or not depends upon the construction of the general rule they have adopted. He must extract the rule.

These difficulties were presented to the writer, at the bar as well as upon the bench, and were suggestive of the preparation of this work. He had to extract from a large number of decisions the rule of the Wisconsin court,—a matter of no little difficulty. When precedents were sought to be applied (as they often were) from New York, Massachusetts, Ohio, and other states, their value depended upon the construction placed upon the rule by their courts,—whether the same as by the Wisconsin court in analogous cases; and this had to be determined, most frequently, by the logic used by the courts, rather than the result declared. The rule applied in Ohio, or the construction of the general rule there, had no application. In Massachusetts it would apply as to some particular subjects, but not as to others. Even the rule in New York could not always be relied upon. In some particulars the reasoning of its court is not in harmony with the logic of the Wisconsin court.

The writer has attempted in this work to save courts and practitioners much of the labor that otherwise they would encounter, and relieve them, to some degree, from the difficulties of which he has spoken. He has reviewed the decisions of the different states, and sought to deduce therefrom the principles which they applied. The reasoning of the courts had to be consulted, and in many instances is placed before the reader; apparent inconsistencies have been noticed, and distinctions made plain; comparisons have been made, and results stated. The subject has been classified under appropriate heads. The implied duties and obligations growing out of the contract of service have been taken as the central and predominating feature. Prominence has been given to those decisions which declare that the relation between master and servant rests in contract, as stating rules more certain in their application, and most just in their results. The doctrine of fellow servant has been classified by states, as the only method by which an intelligent and concise statement of this branch of the law can be presented. In the text the reasoning of the courts is given; in some cases at considerable length. In the index conclusions are concisely stated, making it a most valuable part of the work. The exact rule declared by the court of any state can be ascertained in a moment. In fact, the index is to a great extent an analysis of the subjects treated throughout the work. The work is designed to be practical, rather than theoretical; to present concisely the conclusions of the courts, and in such a manner that they can readily be found, and, when found, understood. Yet the writer has indulged in criticism. This was made necessary by inconsiderate expressions used by judges, as well as departures made by courts in some cases from doctrines otherwise well defined and declared. The purpose was

not simply to criticise, but to call to the attention of the reader, and impress upon his mind, the fact that the language of the cases, at least, was exceptional. It is not to be understood that the efforts of courts have produced certainty of rule in their respective jurisdictions, applicable to all conditions and circumstances. In fact, it may be said the rules declared by them are quite flexible; that there remains much of doubt and uncertainty. It is cause for regret that more certainty and greater uniformity have not been obtained. This want of uniformity ought to be suggestive of a uniform code of laws upon the subject.

EAU CLAIRE, WIS., May 21, 1894.      W. F. BAILEY.

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**THE LAW**  
**OF THE**  
**MASTER'S LIABILITY**  
**FOR**  
**INJURIES TO SERVANT.**

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**CHAPTER I.**

**IMPLIED DUTIES OF THE MASTER.**

**The implied duties are—**

**To furnish reasonably safe appliances for use of servant, p. 2.**

**To provide reasonably safe place for the doing of the work, p. 3.**

**To employ competent and skillful servants, and a sufficient number of them, p. 3.**

**The measure of his duty in these respects is ordinary care, p. 3.**

**Test of ordinary care in several states discussed, pp. 4-8.**

**Statement of the federal court criticised, pp. 9-11.**

**The relationship of master and servant may, and most frequently does, exist by simple mutual agreement that the servant is to labor for the master. In such case the law**

holds that the terms of the contract are not fully expressed, and that there exist by implication reciprocal rights and obligations on the part of each, which it will protect and enforce as fully as if expressed by the parties.

A master is liable in damages, ordinarily, to his servant who is injured through the master's failure of duty towards him; negligence being nothing more nor less than a failure of duty. Among the implied obligations resting upon the master are (1) that he shall provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit;<sup>1</sup> (2)

<sup>1</sup> *Stephenson v. Duncan*, 73 Wis. 406, 41 N. W. 337; *Naylor v. Railway Co.*, 53 Wis. 661, 11 N. W. 24; *Lake Shore, etc., R. Co. v. McCormick*, 74 Ind. 440; *Wormell v. Railway Co.*, 79 Me. 404; *Brabbits v. Railway Co.*, 38 Wis. 289; *Smith v. Railway Co.*, 42 Wis. 520; *Dorsey v. Construction Co.*, Id. 583; *Wedgewood v. Railway Co.*, 44 Wis. 44; *Stetler v. Railway Co.*, 46 Wis. 497, 1 N. W. 112; *Stetler v. Railway Co.*, 49 Wis. 609, 6 N. W. 303; *Bessex v. Railway Co.*, 45 Wis. 477; *Hulehan v. Railway Co.*, 58 Wis. 319, 17 N. W. 17; *Ford v. Fitchburg Ry. Co.*, 110 Mass. 240; *Holden v. Fitchburg R. R.*, 129 Mass. 268; *Hough v. Railway Co.*, 100 U. S. 213; *Davis v. Railway Co.*, 55 Vt. 84; *Baker v. Railroad Co.*, 95 Pa. St. 211; *Kansas Pacific Ry. Co. v. Little*, 19 Kan. 267; *Kain v. Smith*, 89 N. Y. 376; *Bridges v. Railway Co.*, 6 Mo. App. 389; *Porter v. Railway Co.*, 60 Mo. 160; *Long v. Railway Co.*, 65 Mo. 225; *Baker v. Railroad Co.*, 68 Ga. 699; *Lake Shore & M. S. Ry. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Guthrie v. Railroad Co.*, 11 Lea, 372; *Fuller v. Jewett*, 80 N. Y. 46; *Drymala v. Thompson*, 26 Minn. 40, 1 N. W. 255; *Flike v. Railway Co.*, 53 N. Y. 549; *King v. Railway Co.*, 72 N. Y. 607; *Cone v. Railway Co.*, 81 N. Y. 207; *Chicago & N. W. Ry. Co. v. Jackson*, 55 Ill. 492; *Toledo, W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309; *Galveston, H. & S. A. R. Co. v. Delahunty*, 53 Tex. 206; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Cincinnati, L., St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171.

that he will provide a suitable and reasonably safe place for the doing of the work to be performed by the servant;<sup>2</sup> (3) the providing of other servants when the circumstances require it, sufficient in number, and reasonably skillful and competent, for the performance of the service, so that the servant may not be exposed to unnecessary risk or peril from unskillful or incompetent workmen or servants, or from a lack of a sufficient number of them.<sup>3</sup>

In the performance of these duties, the master is bound to the exercise of reasonable and ordinary care, and such only.<sup>4</sup> The degree of care required in each of these particulars is the

<sup>2</sup> *Bessex v. Railway Co.*, 45 Wis. 477; *Heine v. Railway Co.*, 58 Wis. 531, 17 N. W. 420; *Smith v. Car Works*, 60 Mich. 501, 27 N. W. 602; *Ferren v. Railway Co.*, 143 Mass. 197, 9 N. E. 608.

For other cases, see chapter 9, on Assumed Risks—Obvious Defects—Structures. See, also, Append. p. 537.

<sup>3</sup> *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932; *Laning v. Railway Co.*, 49 N. Y. 521; *Flike v. Railway Co.*, 53 N. Y. 549.

<sup>4</sup> *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 333.

The authorities which sustain the doctrine of the text are many; the following, among others: *Brymer v. Railway Co.*, 90 Cal. 407, 27 Pac. 371; *Lawless v. Railway Co.*, 136 Mass. 1; *Warden v. Railway Co.*, 137 Mass. 204; *Painton v. Railway Co.*, 83 N. Y. 7; *Devlin v. Smith*, 89 N. Y. 470; *Slater v. Jewett*, 85 N. Y. 61; *Greenleaf v. Railway Co.*, 29 Iowa, 14; *Cooper v. Railway Co.*, 44 Iowa, 134; *Hunt v. Railway Co.*, 26 Iowa, 363; *Wormell v. Railway Co.*, 79 Me. 397, 10 Atl. 49; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Kane v. Railway Co.*, 128 U. S. 95, 9 Sup. Ct. 16; *Davis v. Hulett*, 58 Vt. 90, 4 Atl. 139; *Chicago, etc., Ry. Co. v. Carpenter*, 5 C. C. A. 551, 56 Fed. 453.

It is expressly held in the recent case of *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, that the measure of duty to an employé is not such as is due to a passenger or stranger. The same

same.<sup>5</sup> The authorities are all agreed that the degree required to be exercised is that of ordinary care; yet as to what measure of diligence will constitute ordinary care in its relation to particular facts and circumstances, and what comparisons or tests may be, or ought to be, applied as a basis for determining whether the act or omission was the exercise of such degree of care, there is an apparent conflict.

It was very truly said by the federal supreme court in a recent case:<sup>6</sup> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper

is held in *Hunt v. Railway Co.*, 26 Iowa, 363, and *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 278, 30 N. E. 750.

The degree of care required, as stated in the case of *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, is more than ordinary care. It is great and extraordinary care, at least, if not utmost care.

Great care is defined to be such care as is exercised by persons of unusually careful and prudent habits. *Brand v. Schenectady & T. R. Co.*, 8 Barb. 368.

Utmost care means all the care and diligence in the nature of the case. *Baltimore & O. R. Co. v. Worthington*, 21 Md. 368; *Brand v. Schenectady & T. R. Co.*, 8 Barb. 368. It means every possible precaution, no matter how unusual. *Read v. Morse*, 34 Wis. 318. Yet in a late case it was held to be a flexible term, and might express no more than ordinary care. *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 6, 31 N. W. 164.

<sup>5</sup> *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932.

<sup>6</sup> *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679.

instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs."

The supreme court of Vermont defined ordinary care in the following comprehensive language: "A man in any situation of business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances; and the rule by which he is to govern the use of his own is that which is established by the concurrent use of careful and prudent men in that particular business."<sup>7</sup>

The supreme court of Ohio defined it "as such care as is most common and usual in the business."<sup>8</sup>

The supreme court of Massachusetts say, relative to the term and its application: "No exact legal definition of these words, which will embrace all their meaning, and be precisely applicable to every possible case, can be given; that is to say, there is no such thing in existence as an absolute standard of ordinary care and prudence, to which the conduct of individuals in each particular instance can be brought, and by which it can be compared and tested. Care and vigilance should always vary, according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exercised."<sup>9</sup> In another case the same court said: "What is ordinary care cannot be determined abstractly. It has relation to,

<sup>7</sup> Vinton v. Schwab, 32 Vt. 612.

<sup>8</sup> Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541.

<sup>9</sup> Holly v. Boston Gaslight Co., 8 Gray, 131.

and must be measured by, the work or thing done and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case would be gross negligence in another. We look to the work, its difficulties, dangers, and responsibilities, and then say, 'What would and should a reasonable and prudent man do in such an exigency?' The word 'ordinary' has a popular sense which would greatly relax the rigor of the rule. The law means by ordinary care the care reasonable and prudent men use under like circumstances;"<sup>10</sup> or, as expressed in another case, "such care as men of ordinary sense, prudence, and capacity would exercise under like circumstances."<sup>11</sup>

In discussing the application of the term, the supreme court of Iowa used the following language: "It may be, and doubtless is, true, that under circumstances of great peril more prompt efforts should be put forth to avoid a threatened injury than are required under circumstances when the danger is less imminent; but this is only the exercise of ordinary and reasonable diligence. The care and diligence required are such as ordinarily prudent men usually exercise under such circumstances."<sup>12</sup>

In New York it was stated thus: "The rule is simple, practical, and easy of application. The question is, what would a majority of men of common intelligence have done under like circumstances? Ordinary care, skill, and diligence is such a degree of care, skill, and diligence as men of ordinary prudence under similar circumstances usually employ."<sup>13</sup> As applied to appliances, the same court stated the test in the following words: "The master is required to

<sup>10</sup> Cayzer v. Taylor, 10 Gray, 280.

<sup>11</sup> Shaw v. Railway Co., 8 Gray, 79.

<sup>12</sup> Willoughby v. Railway Co., 37 Iowa, 432.

<sup>13</sup> Ernst v. Hudson River R. Co., 35 N. Y. 9.

furnish such appliances as are reasonably safe and suitable; such as a prudent man would furnish if his own life was exposed to the danger that would result from unsuitable or unsafe appliances.”<sup>14</sup>

In Rhode Island it was said to be “such care as prudent men skilled in the business would ordinarily exercise under the circumstances.”<sup>15</sup>

It was said by a Pennsylvania court that “the test of negligence in methods, machinery, and appliances is the ordinary usages of business.” \*

In Wisconsin the supreme court say: “The degree of care is the same, whether the circumstances which require it suggest great or little danger. In either case, reasonable care, or, what is the same thing, ordinary care, only is required. The term ‘reasonable care’ has no fixed or definite signification, but is a relative term. The caution which persons of ordinary prudence would exercise in any given case is ‘reasonable care,’ as the term is used under the law. That which under some circumstances might be reasonable care might under other circumstances be gross negligence.”<sup>16</sup> And again: “Ordinary negligence is the want of ordinary care, or of that degree of diligence which men in general exert in respect to their own concerns.”<sup>17</sup> In the latter case Judge Dixon very forcibly illustrated the controlling effect of circumstances upon the measure of care that ought to be exercised and maintained. He said: “The amount or kind of vigilance and caution requisite in each of the three degrees of care recognized by law as slight,

<sup>14</sup> Marsh v. Chickering, 101 N. Y. 400, 5 N. E. 56; Carlson v. Bridge Co., 132 N. Y. 278, 30 N. E. 750; Burke v. Witherbee, 98 N. Y. 502.

<sup>15</sup> Smith v. Old Colony & N. R. Co., 10 R. I. 22.

\* Titus v. Railway Co. (Pa. Sup.) 20 Atl. 517.

<sup>16</sup> Read v. Morse, 34 Wis. 318.

<sup>17</sup> Ward v. Railway Co., 29 Wis. 148.



ordinary, and great is relative, and governed by the circumstances of each particular case; and it is obvious that greater vigilance and caution may be needful in the exercise of ordinary care in some cases than is required to constitute what is termed in the law 'great care' in others. A person bound to only ordinary care of jewels or diamonds would be required to bestow more attention, and exercise greater vigilance and caution, than one bound to great care of wood or coal or other such articles; but notwithstanding these differences, arising from the nature or situation of the thing to be cared for, the degrees of care as defined by law, and which depend upon the peculiar relations existing between the parties and the obligations arising therefrom, are not to be lost sight of or disregarded."

A very accurate statement of the question is made by the supreme court of Michigan. They say: "The degree of care required in any business must be proportioned to its nature and risks. The business of railroads is one of great risk, and requires great caution. Every one has a right to expect that railroads will be managed according to the common custom; and such companies have the right, in their turn, to expect conformity to this. Every person dealing with them has his own duty to perform, in harmony with theirs. All railroad companies are held to the duty of being prudent railroad companies, and are bound to conduct their business with such precaution as prudence has usually found necessary. As compared with the care needed in business involving no human risk, the care required to be used may be called 'extraordinary,' but, as compared with each other, all have the same duty."<sup>18</sup>

There is but little, if any, substantial conflict in the foregoing cases, or, in fact, in the decisions in most of the

<sup>18</sup> Michigan Cent. Ry. Co. v. Coleman, 28 Mich. 448.

states, either as to the degree of care required or the test which is to be applied. Different language, only, is used to express the same thing in substance; and I think it is safe to state the rule, as generally held, to be "such care, prudence, and caution as are exercised and used by ordinarily prudent men, skilled in the business, under like circumstances."

The supreme court of the United States, however, in late cases, has seen fit to question the rule; not as to the degree of care so much as the manner of expressing or defining it, and stating the comparison and test so usually applied.† They say: "Ordinary care on the part of a railroad company implies, as between it and its employés, not simply that degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of the employer, is fairly commensurate with the perils and dangers likely to be encountered. Ordinary care implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employé, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise." The court further say they "cannot give their assent to the doctrine that ordinary care, in such cases, means only that degree of diligence which is customary, or is sanctioned by the general practice and usage which obtains, among those intrusted with the management and control of railroad property and railroad employés; that a degree of care

† *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932.

ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care, within the meaning of the law." The deduction which I draw from this language, as used, is that an imperative duty to exercise reasonable care in furnishing reasonably safe appliances cannot be excused on the ground of a general custom which would permit the disregard of such duty; that custom alone cannot excuse a failure of duty, as they say further: "If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised."

The exact meaning of the language used, however, is not very apparent, nor how far it was intended, if at all, to change or vary established precedents. There may be a wide distinction between what careful, prudent men or officers ought to do and what in general they are doing, or have done, or would do under the same circumstances. Men ought to exercise great care and caution in all their affairs, but experience teaches us that even the most prudent do not reach that standard. How or in what manner, or by what comparison or tests, if any, did the court intend that the degree of watchfulness, caution, and foresight such officers ought to exercise should be determined, or by what standard is their conduct to be measured? Is it to be left to the mere caprice of a jury of uninformed or unskilled men, and are all tests based upon experience or practical use, as evidenced by such use, to be discarded? The most certain test of what is safe and proper, and the least likely to result in injustice, is that care which ordinarily prudent persons, having practical experience and skill, adopt in those matters which directly concern the management of their

affairs, and which involve the welfare and safety of their persons or property. It is far safer to adopt the result of their prudence and judgment than to ignore it, and accept in its stead some other standard, even though, to the unskilled or inexperienced mind, it may appear more practical, useful, or safe.

It would be very unsafe for a court to permit a jury to fix an arbitrary standard of duty in any given case. The causes of accident are best seen, and the danger to be apprehended therefrom best appreciated, after the event has occurred. The accident itself not only reveals the cause, but, more forcibly than aught else, suggests what might have been done to avoid it. But for the accident, there might have been nothing ordinarily to suggest danger, even to the prudent. Yet a jury of men, such as ordinarily, at least, constitute a panel, would be very apt to be influenced by what is suggested by the accident, and assume that it ought to have been anticipated, and that the standard of duty required of the master was such, and such only, as would have insured absolute safety. Courts, when requested, are required to instruct the jury as to ordinary care, and their duty is to make what it requires so plain that it can be easily and readily comprehended by the average mind. It would be very difficult to do so if all standards were ignored, and the jury, unrestrained, were at liberty arbitrarily to determine and say what ought or ought not to have been done in a given case.

In a more recent case the supreme court of the United States approved of a standard or test that is more in harmony with what is undoubtedly the true rule, where the trial judge, in his instructions to the jury, used the following language: "You fix the standard for reasonable, prudent, and cautious men, under the circumstances of the case as you find them, according to your judgment and experience

of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard.”<sup>19</sup>

<sup>19</sup> Grand Trunk Ry. Co. v. Ives, 144 U. S. 417, 12 Sup. Ct. 679.

## CHAPTER II.

### MASTER'S DUTY—CHARACTER OF APPLIANCES.

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Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing machinery reasonably safe and suitable for the use of the latter.

If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant.<sup>1</sup>

He may furnish such appliances as are ordinarily sufficient for the purposes intended. If they are of an ordinary

<sup>1</sup> *Washington, etc., R. Co. v. McDade*, 135 U. S. 571, 10 Sup. Ct. 1044; *McCombs v. Railway Co.*, 130 Pa. St. 182, 18 Atl. 613; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Elcheler v. St. Paul Furniture Co.*, 40 Minn. 263, 41 N. W. 975; *Columbus & I. C. Ry. Co. v. Arnold*, 31 Ind. 174; *Lake Shore & M. S. Ry. Co. v. McCormick*, 74 Ind. 440; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Cincinnati, H. & D. Ry. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Cincinnati, I., St. L. & C. Ry. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 418; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47; *Lawless v. Railway Co.*, 136 Mass. 1; *Payne v. Reese*, 100 Pa. St. 301; *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Fort*, 17 Wall. 553; *Ellis v. Railway Co.*, 95 N. Y. 546; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; *Gunter v. Graniteville Manuf'g Co.*, 18 S. C. 262.

The term "appliances of the business" embraces not only machinery, premises, and all the implements of every kind used in and about the business, but also the persons employed to operate them. *Johnson v. Ashland Water Co.*, 71 Wis. 557, 37 N. W. 823; 3 Wood, Ry. Law, p. 1487, § 381.

The master is bound to the exercise of reasonable and ordinary care and diligence, and such only, in providing safe tools, appliances, and machinery for the use of his servants. *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314; *Kranz v. White*, 8 Ill. App. 583; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 333. He is not bound as an insurer for its absolute safety and suitability. *Camp Point Manuf'g Co. v. Ballou*, 71 Ill. 417; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Indianapolis, B. & W. Ry. Co. v. Toy*, 91 Ill. 474.

The duty of the master to furnish safe appliances is not affected



character, and such as can, with reasonable care, be used without danger, except as may be reasonably incident to the business, it is all that the law requires.<sup>2</sup>

While such, in general terms, are the duties imposed by the fact that he does not own the instrument furnished. *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314.

If the defect in machinery or appliances is such that the master, in the exercise of ordinary care, *would* have discovered it, he is liable; but it cannot be said that the master is liable when the defect is such that, in the exercise of such care, he *could* have discovered it. That would further extend the liability. *The Norway v. Jensen*, 52 Ill. 373; *Wabash, St. L. & P. Ry. Co. v. Moran*, 13 Ill. App. 72.

Where the master has furnished tools and appliances not the best, but such as may be used without danger by ordinary care, he has discharged his duty. *Pittsburg & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276.

An engine used on a regular freight train without a cowcatcher or pilot is defective. *Tennessee Coal, Iron & Ry. Co. v. Kyle* (Ala.) 8 South. 764.

Negligence may be inferred from the nature of a defect. *Mateer v. Missouri Pac. Ry. Co.* (Mo. Sup.) 15 S. W. 970.

It is not negligence per se, as between master and servant, to

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<sup>2</sup> *Wormell v. Railroad Co.*, 79 Me. 404, 10 Atl. 49; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276; *Greenleaf v. Railway Co.*, 29 Iowa, 14; *Burns v. Railway Co.*, 69 Iowa, 452, 30 N. W. 25; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Marsh v. Chickering*, 101 N. Y. 400, 5 N. E. 56; *Carlson v. Bridge Co.*, 132 N. Y. 278, 30 N. E. 750; *Lytle v. Railway Co.*, 84 Mich. 289, 47 N. W. 573; *Lake Shore, etc., Ry. Co. v. McCormick*, 74 Ind. 440; *Indiana Car Co. v. Parker*, 100 Ind. 187; *Trask v. California S. R. Co.*, 63 Cal. 96; *Lawless v. Railway Co.*, 136 Mass. 1; *Ellis v. Railway Co.*, 95 N. Y. 546; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433.

Where the undisputed evidence shows that the machinery by which a servant was killed was that in general use, and was regarded as reasonably safe if prudently used, it is sufficient, though better machinery exist. *Lehigh & W. Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387.

upon the master, yet what the specific duties enforced upon him are which will constitute the degree of care required, or the omission of which will constitute a want of such care, must, of course, depend upon the particular circumstances

omit to cover or protect a buzz saw; but the question depends upon the circumstances of each case, the nature of the service, the degree of the exposure, and notice thereof to the servant. *Carroll v. Williston*, 44 Minn. 287, 46 N. W. 352.

It is a question for the jury whether a switching rope furnished for use in coupling cars, one of which had no drawhead, was a reasonably safe appliance. *Muirhead v. Hannibal & St. J. R. Co.*, 103 Mo. 251, 15 S. W. 530.

Bumpers on an engine and cars, when of unequal height, are defective appliances. *Donohue v. Brooklyn City R. Co.* (City Ct. Brook.) 14 N. Y. Supp. 639. Bumpers on cars of unequal height are defective appliances, when suitable links to couple them are not provided. *Denver, T. & G. R. Co. v. Simpson*, 16 Colo. 55, 26 Pac. 339.

Switches in yards without lights on them are not defective appliances, unless it appears that it was the common and uniform practice to have such lights, and that switchmen had a right to expect them. *Grant v. Union Pac. Ry. Co.*, 45 Fed. 673; *Town v. Michigan Cent. Ry. Co.*, 84 Mich. 214, 47 N. W. 665.

A telltale, though located and arranged so as to be sufficient for persons on cars of ordinary height, which yet is dangerous, or would not subserve its purpose for persons upon cars of greater height which have come into use for special purposes, is a defective appliance. *Darling v. New York, P. & B. R. Co.*, 17 R. I. 708, 24 Atl. 462.

It is not negligence per se for a railroad company to adopt a device for coupling cars, not before in use on its road, without discarding those already in use by it, although the use of the two together may be more hazardous than would be the use of either alone. *Pittsburg & L. E. R. Co. v. Henly*, 48 Ohio St. 608, 29 N. E. 575.

The fact that a coupling of the character used by defendant was in general use among railroad companies only tends to show ordinary care in its selection, and is not conclusive evidence that

of each case. It must be kept in mind that ordinary care as to safety of appliances and premises does not require that every possible contingency must be anticipated and guarded

defendant was not negligent. *Martin v. California Cent. Ry. Co.*, 94 Cal. 326, 29 Pac. 645.

In the construction of a railroad, the single spiking of a rail upon three ties, and the omission to spike the fourth, upon a curve of five or six degrees, is a defect. *Colorado Midland Ry. Co. v. Naylor*, 17 Colo. 501, 30 Pac. 249.

Not removing an accumulation of snow, ice, and dirt on the flanges of rails is negligence, and makes the appliance defective. *McClarney v. Chicago, M. & St. P. Ry. Co.*, 80 Wis. 277, 49 N. W. 963.

When side tracks are so constructed that, when cars are standing thereon, freight trains cannot pass without endangering the lives of brakemen engaged in the discharge of their duties, such tracks are defective as appliances. *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27.

Where a servant was injured by the explosion of a lamp, to be used in removing old paint from cars, there being evidence that the cause of the explosion was an escape of gas from the lamp, where it had been soldered by soft solder, and that soft solder would be likely to melt, negligence was a question for the jury. *Wood v. Illinois Cent. R. Co.*, 23 Ill. App. 370.

A railroad company is liable for injuries sustained by a yardmaster coupling cars, which resulted from the defective condition of a set of platform scales over which its trains are accustomed to pass, though owned by and built upon the land of a coal company. *Little Rock & Ft. S. Ry. Co. v. Cagle*, 53 Ark. 347, 14 S. W. 89.

Failure to furnish implement for shifting belting, when it does not appear that such implement, if furnished, would have prevented the accident, is not negligence. *Gordon v. Reynolds Card Manuf'g Co.*, 47 Hun, 278.

The complaint, to be sufficient, must allege how long the defect existed. *Oehme v. Cook* (Com. Pl. N. Y.) 7 N. Y. Supp. 764. The necessity for such an allegation must depend upon nature of defect and other circumstances.

The use by a railroad company of cars with couplings constructed in an unusual or different manner from those of its own cars may

against, but only such contingencies as are likely to occur.

A master is not bound to change his machinery in order to apply every new invention or supposed improvement in

be a breach of duty to an inexperienced brakeman not warned. *Missouri Pac. Ry. Co. v. White*, 76 Tex. 102, 13 S. W. 65.

Where a jury have found that three guys were not sufficient to hold a derrick, their verdict is conclusive upon the question. *Oties v. Cowles Electric Smelting, etc., Co.*, 54 Hun, 635, 7 N. Y. Supp. 251.

A hammer unconnected with mechanical appliances, and used directly by muscular strength, is not machinery. *Georgia Railroad & Banking Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049.

Where the only defect in the machine proven is that a better method might have been provided for putting it in and out of gear, this is not sufficient to show negligence. *Jacobson v. Cornelius*, 52 Hun, 377, 5 N. Y. Supp. 306.

The stakes of a lumber car are constituent parts of a car, within the meaning of chapter 140, Laws N. Y. 1850, which requires railroad companies to carry lumber, and provide special cars for that purpose; and if the company allows the shipper to supply the car with defective stakes, it is liable for injuries caused a brakeman by their breaking. *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, 14 N. E. 407.

There was some evidence that, had the brake upon a car been in good order, the car would have moved but a short distance, when in collision with an engine, in which case an employé on top of the car might have suffered no injury; and it was held a proper question for the jury to determine, upon all the evidence in the case, whether the injury would have occurred if the brakes had been in good order and properly set. *Lilly v. New York Cent. & H. R. Co.*, 107 N. Y. 566, 14 N. E. 503. This would seem to be going too far into the field of conjecture and possibilities. Judges Finch and Earl dissented.

It was error to leave it to a jury to determine the quality of iron in a broken brake pin, where the presumption and proof are that it was good. *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286.

It is the duty of railroad companies to provide repair tracks and

appliances; and he may even have in use a machine or appliance shown to be less safe than another in general use, without being liable to his servant for the consequences of the use of it. If the servant thinks proper to operate such a machine, it is at his own risk. All that he can re-

danger signals, and all appliances reasonably necessary to insure the safety of employes, and to properly instruct their officers. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211.

Where a workman was directed to paint the inside of a water tank, he entered with a lamp, and soon thereafter an explosion occurred, causing his death. It appeared that the paint used contained a large quantity of benzine; that it was a well-known brand, and had been in use many years; that the employer had used it 10 years, purchasing it in large quantities, directly from the factory, ready for use. Held, the accident was outside of the range of ordinary experience, and not due to negligence. *Allison Manuf'g Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. 273.

Where a wheel working upon a shaft is so adjusted to the shaft that the nut holding it is liable to be unscrewed, when the proper method is to so adjust it that the friction would tighten it, the machine is thereby defective and insufficient. *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. T. 353, 19 Pac. 25.

An instruction that, if the machine had been in use several years, it should be deemed safe, is properly refused; it appearing it had been dangerous the whole time. *Id.*

Where the handhold on top of a car, used by brakemen to haul themselves on the roof, had been displaced, and a spike driven in instead, and a brakeman was deceived thereby, and injured, this of itself is not sufficient to charge the accident to negligence of the company. *Fair v. Pennsylvania R. Co.* (Pa. Sup.) 14 Atl. 236.

Where the danger from the use of a roller is apparent to the senses, and no skill is required to avoid danger from its use, it is sufficient, so far as its use affects a person who had used it for a month, and who has seen it worked for a long time. *Berger v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 78, 38 N. W. 814.

Where it appeared that plaintiff accepted service as a brakeman, knowing that defendant did not usually provide foot boards over open cars loaded with machinery, but it was not shown that it was

quire is that he shall not be deceived as to the degree of danger that he incurs.<sup>3</sup>

When, however, an employer negligently permits the use of a machine out of repair, such as an edger, which by reason of its defects is unnecessarily dangerous to his employes, he is liable for an injury resulting to his employé, who is not himself negligent, even though a coemployé is guilty of negligence in managing the machine, and though, if it had been carefully handled, the accident would not have happened.<sup>4</sup>

The master is not liable for hidden defects of which he defendant's custom to so place such cars in a train that brakemen would have to pass over them, a recovery might be had. *Hosic v. Chicago, R. I. & P. Ry. Co.*, 75 Iowa, 683, 37 N. W. 963.

Not negligence to paint switch targets green instead of red, where employé knows of the method. *Naylor v. New York Cent. & H. R. R. Co.*, 33 Fed. 801.

The machinery and cars furnished for use ought not to be so unskillfully constructed that the slightest indiscretion on the part of the operatives would prove fatal. *Toledo, W. & W. Ry. Co. v. Fredericks*, 71 Ill. 296.

\* *Wonder v. Baltimore & O. R. Co.*, 32 Md. 418; *Hanrathy v. Northern Cent. Ry. Co.*, 46 Md. 280; *Indiana Car Co. v. Parker*, 100 Ind. 187; *Lawless v. Railway Co.*, 136 Mass. 1; *Ellis v. Railway Co.*, 95 N. Y. 546. On this point, see Append. p. 541.

The failure to provide covering for cogwheels is not negligence per se. *Townsend v. Langles*, 41 Fed. 919. Where recent machines have cogwheels covered, that fact does not require the master to so provide, nor render one not covered so dangerous as to be unfit for use. *The Maharajah*, 40 Fed. 784.

\* *Sherman v. Menominee Lumber Co.*, 72 Wis. 122, 39 N. W. 365; *Ransier v. Railway Co.*, 32 Minn. 331, 20 N. W. 332.

Where the machinery is suitable for the business, both as to materials and construction, in order to render the employer liable for injury caused by a want of repair notice should be brought home to the master, or to some person whose duty it is to see to its repair. It is not enough that notice is given to a fellow servant em

had no knowledge;<sup>5</sup> nor is he bound to provide against dangers from an unnecessary or inappropriate use of such appliances;<sup>6</sup> nor is he liable for injuries caused by known

employed in superintending another and entirely disconnected branch of the business. *Richardson v. Cooper*, 88 Ill. 270.

It makes no difference whether the cars, in coupling which the employé was injured, were loaded by defendant's employés or not; the company was bound to see that it was properly done. *Haugh v. Railway Co.*, 73 Iowa, 66, 35 N. W. 116. This is not in accord with the weight of authority.

A maul, worn and uneven on its surface, which glanced while being used by a workman, causing him to fall from a bridge, is a defective tool. *Chicago, K. & W. R. Co. v. Blevins*, 46 Kan. 370, 26 Pac. 687.

Railroad companies are not held to the same degree of care in maintaining their side tracks as their main tracks. *O'Donnell v. Duluth, S. S. & A. R. Co.*, 89 Mich. 174, 50 N. W. 801.

<sup>5</sup> *Chicago & N. W. R. Co. v. Scheuring*, 4 Ill. App. 533.

Where a handhold upon a hand car was defective, the defect not being apparent to the eye, it was held a question for the jury whether by ordinary care it could have been discovered by the master. *Gutridge v. Railway Co.*, 105 Mo. 520, 16 S. W. 943.

One who used a freight elevator of the most approved kind, looked after it carefully, and had it inspected every three months by the inspector of the manufacturer, was not responsible, for defects unknown to him, to an employé who frequently rode upon it. *Hart v. Naumburg*, 123 N. Y. 641, 25 N. E. 385.

Where a brake chain was defective at the time it was placed on the car, it is not necessary to prove notice to the company. This follows from the duty on the part of the company by test to ascertain such defects. Case cited and criticised under head of "Inspection" (chapter 6, *infra*). *Morton v. Detroit, B. C. & A. R. Co.*, 81 Mich. 423, 46 N. W. 111.

The mere fact that machinery has a latent defect does not, *prima facie*, establish negligence; nor is the fact that, after an injury, the defect was discovered and remedied, evidence of negligence. *O'Donnell v. Baum*, 38 Mo. App. 245.

<sup>6</sup> *Chicago & A. R. Co. v. Mahoney*, 4 Ill. App. 262

The master is not bound to provide against dangers arising from

defects in machinery, unless they were such as, by the exercise of reasonable care, he might have known to be dangerous;<sup>7</sup> nor does the duty to see that the machinery furnished his servants is reasonably safe require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of their use.<sup>8</sup>

In *Titus v. Railway Co.*<sup>9</sup> is found as clear and distinct an expression of the master's duty in respect to appliances and their general character as any to be found in the books. The court say: "To show that a practice is dangerous does not prove it to be negligent. Some employments are essentially hazardous, and it by no means follows that an employer is liable because a particular accident might have been prevented by some special device or precaution not in common use."<sup>10</sup> All the cases agree that the master is not

an unnecessary or inappropriate use of such appliances. *Chicago, B. & Q. R. Co. v. Abend*, 7 Ill. App. 130. Nor is he bound as an absolute insurer of their absolute safety, though he makes them. *Chicago & A. Ry. Co. v. Mahoney*, 4 Ill. App. 262.

<sup>7</sup> *Morris v. Gleason*, 1 Ill. App. 510.

<sup>8</sup> *Elcheler v. St. Paul Furniture Co.*, 40 Minn. 263, 41 N. W. 975.

It is not incumbent upon a master who has caused a scaffold to be erected, on which planks suitable in quantity and quality are laid in the usual manner to walk upon, without being fastened, to see to it that those planks are adjusted and in proper place at all times; and a servant at work upon the scaffold, who could have noticed the displacement of the planks, cannot recover for injuries sustained by reason of such displacement. *Jennings v. Iron Bay Co.*, 47 Minn. 111, 49 N. W. 685.

<sup>9</sup> 136 Pa. St. 618, 20 Atl. 517.

<sup>10</sup> *Northern Cent. Ry. Co. v. Husson*, 101 Pa. St. 1.

Hydraulic test being extraordinary, and rarely used, failure of company to apply it to defective boiler does not authorize imputation of negligence; nor does failure to apply steam test. *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

The master may use such appliances as the experience of trade



bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for in regard to the style of the implement, or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. The test of negligence as to employers is the same; and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the customs or control the business of the community."

The same court had said in *Delaware River Iron Ship-Building, etc., Works v. Nuttall*:<sup>11</sup> "The test of the character of machinery is general use. It is not enough that

and manufacture sanctions as reasonably safe. *Washington & G. R. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044.

<sup>11</sup> 119 Pa. St. 149, 13 Atl. 65.

Where an employé had been injured from being struck by a stick that had been caught and thrown violently forward by a circular saw, it was error to charge that the defendant was negligent in failing to provide the saw with an attachment called a "spreader;" such attachment not being in general use, and there being no gen-

some persons regard an attachment as a valuable safeguard. Tried by this test, the saw of the defendant was such a one as the company had a right to use, because it is such as is commonly used by millowners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader."

Again, in *Northern Cent. Ry. Co. v. Husson*,<sup>12</sup> the court say: "There can be no doubt that the coupling of railway cars is a hazardous business; but it by no means follows that, because of an accident to such an employé while performing his duty, the employer is liable simply for the reason that the particular accident might have been prevented by some special device or precaution not in common use."

Again, in *Allison Manuf'g Co. v. McCormick*,<sup>13</sup> the court say: "The general rule requires of the master that he provide materials and implements for the use of his servant, such as are ordinarily used by persons in the same business."

In *Washington & G. R. Co. v. McDade*<sup>14</sup> it was stated that the master was justified in using such machinery as the experience of trade and manufacture sanctioned; and in *The Maharajah*,<sup>15</sup> it was said: "If, in any case, the master could be held liable for accidents happening to workmen whom he had hired to work upon a well-known machine in its usual condition, it could only be when it

eral agreement among millowners or practical sawyers that it was desirable or useful. *Delaware River Iron Ship-Building Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Hosie v. Chicago, R. I. & P. Ry. Co.*, 75 Iowa, 683, 37 N. W. 963.

<sup>12</sup> 101 Pa. St. 1.

<sup>13</sup> 118 Pa. St. 519, 12 Atl. 273.

<sup>14</sup> 135 U. S. 574, 10 Sup. Ct. 1044.

<sup>15</sup> 40 Fed. 784.

might fairly be said that, having reference to other machines, the machine in question was so hazardous as not to be fit for use." Further, the court say: "As respects travel on steam railways, many of the courts of this country hold the carrier bound to keep pace with new inventions in the direction of safety. But this rule is an exceptional one, established upon grounds of public policy, and for the safety of human life. It has never been applied to the relation of master and servant. It is not negligence, or a breach of legal duty, for a master to hire men to work upon an old machine, merely because there are newer and safer ones in use, even though the newer ones may have some additional safeguards."

In *Jacobson v. Cornelius*<sup>16</sup> it was held that the mere fact that machinery could have been put in and out of gear in a better manner, and so have made the operation more safe, by the use of certain appliances, did not tend to show actionable negligence.

In California, without discussion in the opinion, the court contents itself with the statement, generally, that furnishing appliances in general use only tends to show ordinary care, and is not conclusive evidence that the defendant was not negligent.\*

In the case of *Laffin v. Railway Co.*<sup>17</sup> the question of the use of customary appliances, and such as experience had shown to be reasonably safe, is quite fully discussed. There a platform was alleged to be unsafe by reason of being too far from the car. The evidence showed the platform had been used for many years, and no other person had suffered injury. There was no proof that it was not con-

\* 52 Hun, 377, 5 N. Y. Supp. 306.

\* *Martin v. Railway Co.*, 94 Cal. 326, 29 Pac. 645.

" 106 N. Y. 136, 12 N. E. 599.

structed in the ordinary way. Under such circumstances, say the court: "How can it properly be said that the defendant was guilty of any carelessness in its construction or maintenance? It was not bound to so construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. When it had always been thus safe, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?"

In *Dougan v. Transportation Co.*<sup>18</sup> a passenger slipped under the gangway rail of a steamboat, and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner, that they had been so run for many years, and there was no proof tending to show that any one had ever before gone overboard in that way; and it was held the plaintiff was properly nonsuited. Holding to the same effect, and upon principle, that where machinery or appliances, not being out of repair, have proved adequately sufficient, and after long-continued use no accident or injury has occurred from their use, the master cannot be charged with negligence in continuing their use upon the ground that an accident ultimately did happen which might have been prevented had other safeguards been provided, are the following cases: *Loftus v. Union Ferry Co.*;<sup>19</sup> *Burke v. Witherbee.*<sup>20</sup>

There are some cases, however, that do not adopt the rule stated to its fullest extent, but rather qualify it by stating that evidence of such customary and long-continued use may be entitled to much weight, but is not conclusive upon the subject of the exercise of due care. In

<sup>18</sup> 56 N. Y. 1.

<sup>19</sup> 84 N. Y. 455.

<sup>20</sup> 98 N. Y. 562.

And see *La Pierre v. Chicago & G. T. Ry. Co.*, (Mich.) 58 N. W. 60.

*Wabash Ry. Co. v. McDaniels* <sup>21</sup> the court was quite severe in its disapproval of the rule that customary use by prudent companies was proof of the exercise of ordinary care. In the former chapter this case has been criticised as at variance with all the cases upon the question of ordinary care.

The supreme court of Massachusetts was called upon to apply the rule stated by the New York court, in *Myers v. Iron Co.*,<sup>23</sup> and they say: "The defendant greatly relies upon the fact that no person had ever before been injured in descending the shaft by means of the bucket, although it had been much used for that purpose, and urges us to adopt and apply to the present case a rule stated by the court of appeals of New York in the following terms: 'When an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of imprudence or carelessness.' But it is hardly practicable to express by a single formula a rule which shall be applicable to all cases. The rule above stated may have needed no qualification as applicable to the case before that court. The court had already declared there was no ground for apprehension, even, that the machine or its appliances had been injured by use, or that, for any reason, it was less safe and efficient than at first; and again: 'If there was any defect, it must have been in the original construction;' and it held the undisputed evidence showed that the machine was sufficient in its construction, and was of a kind commonly in use when it was put in, and that it was plain that the injury to the plaintiff was caused by the act of the engineer, who was a fellow servant with the plaintiff. In the present case the fact that no

<sup>21</sup> 107 U. S. 454, 2 Sup. Ct. 932.

<sup>23</sup> 150 Mass. 136, 22 N. E. 631.

person had been hurt is entitled to much weight; but in our opinion it was not conclusive of the defendant's due care, especially in view of the evidence tending to show that the original efficiency of the brake had been impaired."

I think it will hardly be contended that the statement of the proposition, though classed as a rule by the New York court, has, or should have, any place as such. It has the elements which, more definitely expressed, might constitute a rule of evidence; but to classify it as a rule of law, and construe it literally, would conflict with many rules, now firmly established, expressive of correct legal principles. It would be absurd to hold that an employer might keep his machinery in use until an accident happened, without giving it any examination to ascertain if it had become impaired by such use, or that repairs need not be made until actual breaking occurred. It is quite evident, however, from a careful reading of the cases in which the rule was stated, that it was intended only to apply to the character and sufficiency of the appliances, as to manner of construction, location, and the like, and not to defects occasioned by use or want of repair.

In *Richmond & D. R. Co. v. Jones*,<sup>24</sup> the Alabama court state their views in the following language: "It is the duty of railroads to keep themselves reasonably abreast with improved methods, so as to lessen the danger attendant upon the service; and, while they are not required to adopt every new invention, it is their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business, and surrounded by like circumstances."<sup>25</sup> There have been such advancements in sci-

<sup>24</sup> 92 Ala. 218, 9 South. 270.

<sup>25</sup> *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 South. 764.

ence for the control of steam, and improvements in machinery and appliances used by railroads for the better security of life, limb, and property, that it would be inexcusable to continue the use of old methods, machinery, and appliances known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer, which are in general used by well-regulated railroads. Not that it is required of them to adopt every new invention useful in the business, although it may serve to lessen danger; but it is their duty to discontinue old methods which are insecure, and to adopt such improvements and advancements as are in ordinary use by prudently conducted roads engaged in like business, and surrounded by like circumstances."

The Pennsylvania court must be correct in its expression of the rule,\* so long as it is maintained that ordinary care is the standard of the master's duty. We know no rule by which to measure human conduct by that standard, other than by comparing a party's conduct with the conduct of the ordinarily prudent under similar circumstances. It will not do to permit a jury to say that all such men are habitually careless,—much less a court,—or, from their unpracticed view alone, to say what machinery or improvements practical men shall employ in their business. The absurdity becomes apparent upon mere suggestion. If the party, according to his peculiar notion, should adopt a device not in common use, and injury should flow therefrom, he would be embarrassed in defending upon the ground that he acted thus in the exercise of ordinary care. In order to present such a defense, he must ordinarily satisfy a jury that his device was rea-

\*Ante, p. 23 et seq.

sonably safe as matter of fact, not that he exercised ordinary care in adopting its use.

Say the Vermont court: "A man in any situation or business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances; and it is negligence to make any important departure from such course, when it proves more injurious to others than the usual course. The rule by which he is bound to govern the use of his own is that which is established by the concurrent use of careful and prudent men in that particular business."<sup>26</sup> And the Michigan court: "Every one has a right to expect that railroads will be managed according to the common custom; and railroad companies have a right, in their turn, to expect conformity to this."<sup>27</sup>

The policy of courts too frequently has resulted in submitting questions for the determination of a jury, which, from their nature, the jury were incompetent to decide, especially questions which relate to the sufficiency and character of structures and appliances in a business requiring the exercise of skill and great practical knowledge. The supreme court of the United States, in *Tuttle v. Railway Co.*,<sup>28</sup> very properly restrict such policy, and do so with abundant reason, when they say: "We do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinion of jurors to determine such an engineering

<sup>26</sup> *Vinton v. Schwab*, 32 Vt. 614.

<sup>27</sup> *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 449.

<sup>28</sup> 122 U. S. 194, 7 Sup. Ct. 1166.



question. The interest of railroad companies themselves is so strongly in favor of easy curves, as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with, in determining their obligations to their employes. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto, and, if they decide to do so, they must be content to assume the risks." Again, in *Randall v. Railway Co.*,<sup>29</sup> it is said: "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another; and any one who enters the service of a railroad corporation, connected with the moving of trains, assumes the risks of such condition of things."

It would seem, by force of the reasoning of the learned court, that the same rule should apply to the character and manner of construction of such appliances as require skill and great practical knowledge to construct or adapt to use, especially when such adaptation is necessarily influenced or controlled by many extrinsic facts and circumstances. "A railroad company is not required to have all its cars or locomotives constructed after the same pattern. It may lawfully construct them after different models, and may use different appliances in operating its railroad. The law only requires that such cars, locomotives, and appliances shall be reasonably safe for the uses to which they are put."<sup>30</sup>

<sup>29</sup> 109 U. S. 482, 3 Sup. Ct. 322.

<sup>30</sup> *Whitwam v. Railway Co.*, 58 Wis. 413, 17 N. W. 124.

The general rule has no application to the safety and condition of the thing the servant is employed to repair.<sup>31</sup> Where a servant is employed to put a thing in a safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purposes of such employment.

Ordinary care requires that a master shall take notice of the liability of the parts of the machinery to decay from age, or wear out by use, and make provision for such contingencies.<sup>32</sup> Reason and experience unite in affirming that an owner does not exercise even ordinary care who gives no attention to the effect upon ropes, belts, timbers, or the like which is produced by the wear of continued use. It would be unreasonable to assert that an owner might entirely disregard the tendency of parts of his machinery to wear out, and entrench himself from liability on the ground that at the outset he had provided safe machinery and appliances.

<sup>31</sup> *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497; *Murphy v. Railway Co.*, 88 N. Y. 146; *Bryant v. Railway Co.*, 66 Iowa, 305, 23 N. W. 678; *Howland v. Railway Co.*, 54 Wis. 226, 11 N. W. 529; *Brick v. Railway Co.*, 98 N. Y. 211.

<sup>32</sup> *Indiana Car Co. v. Parker*, 100 Ind. 193; *City of Indianapolis v. Scott*, 72 Ind. 196; *Board of Com'rs of Allen Co. v. Bacon*, 96 Ind. 31; *Rapho v. Moore*, 68 Pa. St. 404.

The master is bound to know that such tools or machinery will only last a limited time, and it is his duty to renew from time to time. *Baker v. Railroad Co.*, 95 Pa. St. 211.

The mere fact that the brake shoes of a freight car were only half an inch thick, having worn away an inch and a half, is not sufficient to determine a breach of duty on the part of the master, so long as such shoes grasped the wheel effectively. *Smith v. New York Cent. & H. R. R. Co.*, 118 N. Y. 645, 23 N. E. 990.

### CHAPTER III.

#### MASTER'S DUTY (Continued)—CHARACTER OF PREMISES

To provide a suitable place for the work, p. 34.

To see that the premises are maintained in a reasonably safe condition, p. 34.

The duty requires the exercise of ordinary care, p. 34.

The particular duty to be determined from the particular circumstances, p. 35.

The premises as being "reasonably safe." p. 35.

The master's knowledge and duty to know of danger, p. 36.

Duty to inspect and supervise, p. 36.

Duty of railroad companies, pp. 37, 39, 42-45.

In the chapter relating to the character of the master's machinery,<sup>1</sup> as well as in this chapter, relating to premises, only the mere statement of propositions as to the master's general duty is made, for the reason that these subjects are so intimately connected with other duties of the master, as well as duties and conduct on the part of the servant, that a more logical and instructive discussion can be had in treating such subjects in connection with such duties, as we have done in other parts of this work.

The duty of the master to provide a suitable place for his employé to do and perform his work, and to see that it is kept in a suitably safe condition for such purpose, is, as we have seen, governed by the same rules as the master's duty in other respects; that duty being the exercise of

<sup>1</sup> Chapter 2.

ordinary care. What the particular duty may be in this respect in any given case is to be determined generally from the nature and character of the employment, the location of the premises, and the particular facts. There are some employments, the nature of which is so hazardous that no place wherein they may be carried on is reasonably safe. The method employed, and the act to be accomplished, necessarily make the premises unsafe. Other premises are unsafe from their location or surroundings, and necessarily so. What is meant by the use of the term "reasonably safe" is that the perils of the employment shall not be unnecessarily increased by a neglect to use proper care in providing such safeguards as are usual and proper in the performance of hazardous duties of the character assumed, and suitable to the extent that the servant, in the exercise of due care, can perform his duty without exposure to dangers that do not ordinarily come within the obvious scope of such employment as usually carried on.<sup>2</sup>

<sup>2</sup> *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Swoboda v. Ward*, 40 Mich. 423.

An employé cannot recover for injuries received by reason of a stairway's being defectively constructed and dangerous; such defect and danger consisting in the stairway being steep, the want of a railing, and steps at irregular distances apart. The court say: "It is certainly true that it is the duty of the employer to furnish his employé a reasonably safe place in which to work, and with reasonably safe appliances and apparatus. At the same time, it is equally well settled that the employer may conduct his business in his own way, although another method be less hazardous; and the employé takes the risk of the more hazardous method, if he knows the danger and enters the employment. Here the plaintiff must have seen whatever defects existed in the construction of the stairway, for such defects were plain and obvious. If he had used his senses, he would have discovered them the first time he went up and down the stairway." *Sweet v. Ohio Coal Co.*, 78 Wis. 127, 47 N. W. 182.

The master should not direct the servant to work in a place which he knows, or, by the exercise of reasonable care and diligence, might know, to be dangerous, within the rule.<sup>8</sup>

There must be exercised by the master the same duty of inspection, and the same constant and vigilant supervision to discover defects that exist or may occur, as is imposed upon him in regard to the condition of his appliances and

<sup>8</sup> Consolidated Ice Machine Co. v. Klefer, 26 Ill. App. 466.

A corporation whose building superintendent or foreman causes an excessive weight of snow and débris to be thrown upon and left upon the roof of a shed, in consequence of which it falls upon and injures an employé who works under it by his direction, is guilty of negligence, which renders it liable to such employé, if he himself is free from negligence. Johnson v. Bank, 79 Wis. 414, 48 N. W. 712.

Where an ice house was defectively constructed, pursuant to a plan of the owner, even though by an independent contractor, and such defect was the cause of the injury to one working near it, such injury being caused by its fall, the owner is liable for such injury. Meier v. Morgan, 82 Wis. 289, 52 N. W. 174.

When an ice house was filled under the direct supervision of the owners, and, in so filling it, they carelessly permitted ice to be pushed against the side of the building, thus weakening it, causing it to fall, and thereby an employé working near was injured, the owners are liable for the injury. Id.

Such owners, with knowledge of a weakness or defect threatening the strength of the building, cannot set a man at work immediately under it, and shift all responsibility upon the builder. Id.

To the general proposition that the general duty of the master to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks requires him, among other things, to use reasonable diligence in seeing that the place where the service is to be performed is safe for that purpose, see Cook v. Railway Co., 34 Minn. 46, 24 N. W. 311; Noyes v. Smith, 28 Vt. 59; Hutchinson v. Railway Co., 5 Exch. 343; Gibson v. Railway Co., 46 Mo. 163; Huddleston v. Lowell Mach. Shop, 106 Mass. 282; Snow v. Railway

machinery, varied only in respect to the danger that may be anticipated, and which is to be avoided.<sup>4</sup>

Where a coal company knew that boys in their employ were in the habit of using a dangerous entrance to a chute, they were held to the duty, in the employment of a boy of 14, to either forbid its use, or put up proper safeguards about it; otherwise, its use by the boy was not contributory negligence.\*

So it was held gross negligence on the part of the master to place cogwheels which are unprotected and unguarded in such a position, with reference to where his employé is to perform his work, that the employé, by the least forgetfulness or by unavoidable accident, may be thrown upon them and injured.†

It is as much the duty of a railroad company to keep

Co., 8 Allen, 441; *Ryan v. Fowler*, 24 N. Y. 410; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Swoboda v. Ward*, 40 Mich. 420.

The master's duty and liability to his servant extend not only to such unnecessary and unreasonable risks as are in fact known to him, but to such as he ought to know, in the exercise of proper diligence; that is, diligence proportionate to the occasion. *Cook v. Railway Co.*, 34 Minn. 47, 24 N. W. 311; *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 548; *Noyes v. Smith*, 28 Vt. 59; *Gibson v. Railway Co.*, 46 Mo. 163.

The servant has a right to presume that the master will do his duty; and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders, without being chargeable with contributory negligence, or with the assumption of the risks of so doing. *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147; *Hutchinson v. Railway Co.*, 5 Exch. 343; *Gibson v. Railway Co.*, 46 Mo. 163; *Cook v. Railway Co.*, 34 Minn. 47, 24 N. W. 311.

\* *Van Dusen v. Letellier*, 78 Mich. 502, 44 N. W. 572; *Bessex v. Railway Co.*, 45 Wis. 482.

\* *Pennsylvania Coal Co. v. Nee* (Pa. Sup.) 13 Atl. 841.

† *Nadau v. White River Lumber Co.*, 76 Wis. 128, 43 N. W. 1135.

its railroad track in repair as it is, to keep its machinery, engines, and cars in such repair; and any neglect to keep them in such repair, or permitting the same to be obstructed in such manner as to increase unnecessarily the danger to its employes, is negligence for which the company may be responsible, in case of an injury happening to an employé by reason of such want of repair, or obstruction.<sup>5</sup>

<sup>5</sup> *Bessex v. Railway Co.*, 45 Wis. 482.

It is not negligence to use open and unblocked frogs at a station where there are several tracks. *Southern Pac. Co. v. Seley*, 14 Sup. Ct. 530, reversing *Seley v. Southern Pac. Co.*, 6 Utah, 319, 23 Pac. 751.

It is not negligence per se to fail to block frogs and switches. To make it negligence, there must be proof that they are inherently unsafe and dangerous when carefully used, and so generally known by those engaged in operation of railroads. *Missouri Pac. Ry. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401.

A railroad must construct and maintain its roadway and appendages and overhead structures in such manner and condition that an employé can do all the duties required of him with reasonable safety. Where it knowingly maintains a bridge over its track so low that brakemen cannot perform their duty on top of the cars, it is liable to a brakeman who, having no knowledge of its dangerous character, is struck by the bridge, and injured, while in the performance of his duty on top of the car. *Baltimore, etc., Ry. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Houston & T. Ry. Co. v. Oram*, 49 Tex. 341.

A different view is taken by other courts. In *Baylor v. Railroad Co.*, 40 N. J. Law, 23, it is held that a railroad company is not bound to build its bridges high enough to enable its employes safely to stand upright on top of its cars; and a brakeman who, in the performance of his duty, is injured while in that position, cannot maintain an action therefor, although he was suddenly called upon to discharge that duty.

In *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, it was held that a conductor of a railway train, who was injured by a bridge while standing on the top of a car in motion, in the discharge of his duty, and who was well acquainted with its position and character, and accustomed to pass under it, could not recover. This is according

So it has frequently been held that to place structures dangerously near the track,—such as cattle pens, sheds, and the like,—or to permit lumber or other articles to be so

to the great weight of authority. The controlling feature, ordinarily, is the knowledge or opportunity for acquiring knowledge of the character of the structure by the employé. *Hooper v. Railroad Co.*, 21 S. C. 541; *Clark's Adm'r v. Railroad Co.*, 18 Am. & Eng. R. Cas. 85, note; *Baltimore, O. & C. R. Co. v. Rowan*, 23 Am. & Eng. R. Cas. 397, note; *Howard v. Railroad Co.*, 24 Am. & Eng. R. Cas. 458, note; *Altee v. Railway Co.*, 21 S. C. 550; *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. 226; *Wells v. Railway Co.*, 56 Iowa, 520, 9 N. W. 364; *Illick v. Railway Co.*, 67 Mich. 632, 35 N. W. 708.

Where an employé upon a train mounts a car which is 16 or 18 inches higher than those commonly used, and too high to permit him to pass under the bridge standing erect, and he mounted such car either under the danger signals or near them, and where there was nothing to obstruct his view either of the signals or bridge, he could not recover as matter of law. *Lynch v. New York, L. E. & W. R. Co.*, 63 Hun, 635, 18 N. Y. Supp. 417.

Where the distance from the running board on cars commonly in use on defendant's road to the trestle was 5 feet 7½ inches, and plaintiff was 5 feet 8 inches in height, but by stepping to one side of the running board he could pass under in safety, and at the time of his injury he was standing upon a car higher than those commonly in use, which left a space between it and the trestle of only 4 feet 5½ inches, such cars having been in use to some extent, to plaintiff's knowledge, for three months prior to his injury, it was held that the plaintiff was not entitled to recover. *Rock v. Retsof Min. Co.*, 61 Hun, 623, 15 N. Y. Supp. 872.

Where an employé was injured by an overhead bridge while standing with his back to the bridge, watching the passage of the cars over a reverse curve, in the performance of his duty to see and report if any of them should break loose, the tickler or telltale a short distance from the bridge being out of order, and insufficient to warn him of his danger in approaching the bridge, he having knowledge of the location of the bridge, and of the defect in and insufficiency of the telltale, it was held he could not recover. *Wallace v. Central Vermont R. Co.*, 63 Hun, 632, 18 N. Y. Supp. 280. The



piled or placed, is negligence, and, unless excused by some act or conduct on the part of the injured party, the master

fact that he had forgotten the bridge and its danger did not relieve him from the consequences of his negligence, in the absence of any circumstance producing hurry, excitement, or confusion. *Id.*

A rule of defendant required brakemen to keep off high cars when near bridges, and another required them to be on tops of cars at certain times. The plaintiff was knocked off of a high car by a bridge while setting brakes in approaching a station. Held, that the jury should have been instructed to determine, from all the facts and circumstances in evidence, whether, under a fair and reasonable construction of all the rules offered in evidence, the plaintiff was in the line of his duty when injured, and, if he failed to observe one of these rules, whether it was under such circumstances as would justify him in such failure. *Chicago & A. R. Co. v. Matthews*, 39 Ill. App. 541.

A railway company is not bound to block frogs, particularly if it does not appear that, in so doing, it would not entail greater dangers than it would avert. *McGinnis v. Bridge Co.*, 49 Mich. 466, 13 N. W. 819; *Lake Shore & M. S. Ry. Co. v. McCormick*, 74 Ind. 440; *Little Rock & F. S. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808.

Where it is apparent that unblocked switches have been in use upon all railroads for years, it is a fair inference that blocking switches is but an experiment. *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55.

It is not enough to prove that in the opinion of witnesses blocked switches are safer, to establish negligence on the part of the company in the use of unblocked switches. *Id.*

Ordinarily, a servant who has knowledge that frogs or switches are not blocked is precluded from predicated negligence in that respect. He assumes the risk of dangers reasonably expected to flow from the character of such appliances. *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Lake Shore & M. S. Ry. Co. v. McCormick*, 74 Ind. 440; *Wilson v. Railway Co.*, 37 Minn. 326, 33 N. W. 908; *Little Rock & F. S. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808.

It was held in *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. 340, and 19 N. W. 680: "If an experienced servant did not know the

will be liable in damages to his servant who, without fault on his part, is thereby injured.<sup>7</sup>

danger caused by absence of said blocks, he will not be held to have waived the company's neglect in this respect."

In the absence of evidence that blocks were in general use on defendant's tracks, or on those of other roads, the failure to provide a block for the frog at which the accident occurred was not negligence; and where it appears that the plaintiff knew, from his long period of service, that the larger portion of the frogs on defendant's road was not blocked, he must be held to have assumed the risk incident to the use of the frog. *Spencer v. Railway Co.*, 67 Hun, 196, 22 N. Y. Supp. 100.

<sup>7</sup> *Dorsey v. Construction Co.*, 42 Wis. 583.

A switch signal placed so near the track as to scrape the sides of cars is a defective appliance. *Boss v. Northern Pac. R. Co.*, 5 Dak. 308, 40 N. W. 590.

A switch stand within nine or ten inches of cars was held a defective appliance; but other circumstances entered into consideration, among which was that plaintiff had worked in the yard but seven or eight days, and had not noticed the switch stand. A ground switch would have answered every purpose. *Pidcock v. Union Pac. Ry. Co. (Utah)* 19 Pac. 191.

Where it is customary for brakemen, in the performance of their duties, to ascend and descend from the tops of cars by side ladders when the train is in motion, the company is bound to maintain its roadway free from projections which endanger them while so doing. *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 9 South. 252.

Railroad companies are under an obligation to all persons who have a right to be on the top of their trains, in the discharge of any duty, to so construct their overhead bridges, or other overhanging structures adjacent to their tracks, that they will not expose such persons to unnecessary risks, or to perils that can easily and without any great outlay be avoided. If, for any reason, structures of the kind last mentioned are maintained which do expose persons who have a right to be on the top of moving freight trains to unusual risks (such as a liability to be knocked off), then the exercise of ordinary care requires some warning to be given, either verbally or by whiplashes, to all of those persons who, in the discharge of their duties,

So it is held that for a railroad company not to keep its track properly flanged, and free from obstructions—such as ice, snow, and rubbish—which endanger the safety of

are liable to sustain injury in consequence of such structures. *Chicago, M. & St. P. Ry. Co. v. Carpenter*, 5 C. C. A. 551, 56 Fed. 452; *St. Louis, etc., Ry. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146; *Baltimore, etc., Ry. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381; *Louisville, etc., Ry. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, and 17 N. E. 584; *Clark v. Railway Co.*, 28 Minn. 128, 9 N. W. 581; *Flanders v. Railway Co.*, 51 Minn. 193, 53 N. W. 544.

Placing structures unnecessarily close to the track, where it is to be naturally and reasonably anticipated that employés, in the performance of their duties, might come in contact with them, is negligence; and it cannot be said that the place where the servant is required to perform his duties is reasonably safe. It was held that where a section house was placed near a side track, if the company was, from the nature of its servants' duties, and the customary way its trainmen performed them, bound to anticipate that they would have occasion to descend on the sides of the cars, it was negligence to so place such section house in close proximity to the track. *Flanders v. Railway Co.*, 51 Minn. 193, 53 N. W. 544; *Dorsey v. Construction Co.*, 42 Wis. 583.

A railroad company is not to be regarded as negligent because contrivances maintained in operation of its road are necessarily dangerous to employés engaged in operating trains. So held where an engineer was injured, while leaning out of his cab looking for signals from the conductor, by coming in contact with a water crane near the track. *Gould v. Railway Co.*, 66 Iowa, 590, 24 N. W. 227. Yet the same court held that a cattle chute constructed so near the track as to endanger servants operating its trains was a defect for which the company might be liable for injuries caused to its servants thereby. *Allen v. Railroad Co.*, 57 Iowa, 623, 11 N. W. 614. And in *Kearns v. Railway Co.*, 66 Iowa, 599, 24 N. W. 231, it held that the company was negligent in allowing a post to be erected in dangerous proximity to the track.

As to the construction of cattle chutes near the track, the su-

those operating the road, is negligence;<sup>8</sup> and also held that it is the duty of a railroad company to cover culverts on the line of its road in its yards, and within a reasonable distance of switches, wherever it would naturally be anticipated that brakemen, in the proper discharge of their duties, would be apt to go in making couplings.<sup>9</sup>

preme court of Wisconsin is in accord with the doctrine of the Iowa court. *Dorsey v. Construction Co.*, 42 Wis. 583.

It was held in *Bessex v. Railway Co.*, 45 Wis. 477, that lumber piled near the track was such neglect and defect as rendered the company liable to an employé injured thereby; while in *Gaffney v. Railroad Co.*, 15 R. I. 456, 7 Atl. 284, it was held it was not an act of actionable negligence, under the circumstances.

A switch stand projecting near the track, under the circumstances, did not permit a recovery (*Ryan v. Railway Co.*, 10 Ont. 745); nor the position of a water tank (*Davis v. Railroad Co.*, 21 S. C. 93); nor the position of a platform (*Chicago, R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113).

\* *McClarney v. Chicago, M. & St. P. Ry. Co.*, 80 Wis. 280, 49 N. W. 963; *Hulehan v. Railway Co.*, 68 Wis. 520, 32 N. W. 529.

\* *Franklin v. Railway Co.*, 37 Minn. 404, 34 N. W. 898.

The court say in *Little Rock & F. S. R. Co. v. Townsend*, 41 Ark. 382, that they cannot say, as matter of law, that it was the defendant's duty to furnish the plaintiff's intestate with a safe standing place where he alighted to couple or uncouple cars, or that an uncovered culvert was evidence of negligence; that culverts and ties are constructed and placed in position to form a secure roadbed for the passage of defendant's trains, not to furnish a footpath or standing place for defendant's employés. Yet in Minnesota it is held to be the duty of railroad companies to cover culverts in its yards whenever it would naturally be anticipated that a brakeman would be likely to get into the same in making couplings (*Franklin v. Railroad Co.*, 37 Minn. 409, 34 N. W. 898); and in New York, that where an employé knows of a custom of the company to drain freight yards by means of small ditches, he assumes the risk of injury therefrom while engaged in the performance of his duties (*De Forest v. Jewett*, 88 N. Y. 264).

Railroad companies are not liable for injuries received by one of

Railroad companies, however, are not required to put guards upon their bridges for the protection of employes, though in case of accident, or from other causes, its trains may be obliged to stop on such bridges, and injury may be occasioned to employes on such trains;<sup>11</sup> nor to ballast their side tracks for the purpose of making them safe for the employes of the company to walk upon. Ballasting is to make railroad tracks firm and safe for the passage of trains; and the failure to ballast their side tracks is not

its section hands from falling into an open water way, properly constructed, while pushing a push car over a section of its road, nor for the failure of the section master to give to this laborer special notice of the approach of the push car to this water way. *Couch v. Railway Co.*, 22 S. C. 557.

<sup>11</sup> *Koontz v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 224, 21 N. W. 577.

In *Illick v. Railroad Co.*, 67 Mich. 632, 35 N. W. 708, the injury was alleged to have been caused by an improperly constructed bridge. The court said: "Whether it was fourteen or twenty-four feet wide was a matter of no concern of the brakeman, so long as he was not required to occupy a place of danger, in the discharge of his duties, while passing over it; and this he was not required to do. A railroad company cannot be required to condemn and remove a bridge which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridge they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive. As between employers and employes, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require it."

a breach of any duty it owes to its employés.<sup>12</sup> Nor are they chargeable with negligence in leaving snow banks in close proximity to the track, which have been placed there in the usual manner, in clearing their track from the accumulation of snow, made necessary for the operation of their trains;<sup>13</sup> nor in leaving sticks, stones, or baggage close thereto,<sup>14</sup> although the supreme court of Wisconsin held that to leave sticks close to the track, whereby injury might be caused to an employé in the exercise of his duties, was negligence.<sup>15</sup>

<sup>12</sup> *Finnell v. Delaware, L. & W. R. Co.*, 129 N. Y. 669, 29 N. E. 825.

<sup>13</sup> *Dowell v. Railway Co.*, 62 Iowa, 631, 17 N. W. 901; *Brown v. Railway Co.*, 69 Iowa, 161, 28 N. W. 487; *Piquegno v. Railway Co.*, 52 Mich. 40, 17 N. W. 232.

<sup>14</sup> *Piquegno v. Railway Co.*, *supra*.

<sup>15</sup> *Hulehan v. Railway Co.*, 68 Wis. 520, 32 N. W. 529.

As to the liability of a railroad company for injuries sustained by its employes by reason of its failure to comply with a statute requiring it to fence its track or right of way, because of which failure stock stray upon and obstruct the track, see Append. p. 537.

## CHAPTER IV.

### MASTER'S DUTY (Continued)—EMPLOYMENT OF SERVANTS.

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**Allowing jury to consider appearance and conduct of alleged incompetent servant on witness stand, p. 66.**

**Knowledge by injured servant, and assumption of risks, p. 67.**

**Duty of master to furnish an adequate number of servants, p. 68.**

**Duty to see that they are at their posts, p. 70.**

**The servant's incompetency must have been the proximate cause of the injury, p. 70.**

We have seen that the master must exercise due and reasonable care in the selection of his servants, with reference to their fitness and competency. He must also exercise the same degree of care in the matter of the retention of his servants in his service; for his responsibility is the same, whether the want of skill of a servant, or his incompetency from other causes, existed when he was hired, or has come upon him since, if he has been continued in the service with notice or knowledge, either actual or presumed, of such unfitness, by the master.<sup>1</sup>

<sup>1</sup> *Laning v. Railway Co.*, 49 N. Y. 521; *Chicago & G. E. Ry. Co. v. Harney*, 28 Ind. 28; *Ohio & M. Ry. Co. v. Collarn*, 73 Ind. 261; *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Flike v. Railway Co.*, 53 N. Y. 549; *Morse v. Glendon Co.*, 125 Mass. 282; *Gilman v. Railway Co.*, 13 Allen, 433; *Gilman v. Railway Co.*, 10 Allen, 233; *Keith v. Railway Co.*, 140 Mass. 175, 3 N. E. 28; *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. 340, and 19 N. W. 680; *Corson v. Railway Co.*, 76 Me. 244; *Northern Pac. Ry. Co. v. Herbert*, 116 U. S. 655, 6 Sup. Ct. 590; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Peaslee v. Railway Co.*, 152 Mass. 158, 25 N. E. 71; *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228; *Rummell v. Dilworth*, 111 Pa. St. 349, 2 Atl. 355, 363; *Blake v. Maine Cent. R. Co.*, 70 Me. 63; *Lawler v. Androscoggin R. Co.*, 62



Liability on the part of an employer for an injury caused by the incompetency of a fellow servant depends upon its

Me. 467; *Moss v. Pacific Railroad*, 49 Mo. 167; *Harper v. Railway Co.*, 47 Mo. 567; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Wright v. Railroad Co.*, 25 N. Y. 565; *Corson v. Railway Co.*, 76 Me. 244; *Mackin v. Railway Co.*, 135 Mass. 201; *Noyes v. Smith*, 28 Vt. 63; *Coon v. Railway Co.*, 6 Barb. 231; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932; *Taylor v. Railway Co.*, 45 Cal. 323; *Curran v. Manufacturing Co.*, 130 Mass. 374; *Colton v. Richards*, 123 Mass. 484; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *McDermott v. Railway Co.*, 73 Mo. 516; *Baulic v. Railway Co.*, 59 N. Y. 356; *Huntingdon & B. T. R. Co. v. Decker*, 84 Pa. St. 419; *Chicago & N. W. Ry. Co. v. Moranda*, 108 Ill. 576; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338.

*Laning v. Railway Co.*, 49 N. Y. 521, is one of the leading cases upon this branch of the general subject. The reasoning of the court is clear, logical, and convincing. Many authorities are reviewed, and the former case of *Wright v. Railway Co.*, 25 N. Y. 562, is criticised and distinguished. The broad doctrine is forcibly stated that the selection and employment of fit and competent servants is a duty personal to the master. Say the court: "And there is not a performance of it until there have been placed for the servant's help-meets fit and competent fellow servants, or due care used to that end. It is not enough to satisfy the affirmative duty or contract of the master that he selects one, or more than one, general agent of approved skill and fitness. If the general agent goes forward, and carelessly places by the side of a servant another unskilled and incompetent, the duty of the master has not been met; his contract is yet unperformed. We hold, therefore, that a master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow servant, whether it existed when the fellow servant was hired, or has come upon him since the hiring; the fellow servant having been in the first instance hired, or afterwards continued in service, with notice or knowledge or the means of knowledge of this lack. The duty of the master is to use reasonable care to provide and employ none but competent and skillful servants, and to discharge from his service, on notice thereof, any who fail to continue such." The facts were in this case that one Colby was the agent of the defendant, charged with the duty of hiring the

being established by affirmative proof that such incompetency was actually known by the master, or that, if he had

employés, and that among such was Westman, whose duties were those of a foreman over the others, and the plaintiff, Foreman, and Churchill were ordinary laborers. Westman directed Foreman and Churchill to construct a scaffold, which work was so defectively performed that it fell with the plaintiff, causing him injury. This defect was mainly from building it with timbers too small in size, and too poor in quality, being cross grained, and hence weak. Westman was a competent man in skill and natural judgment. It did not appear, at the time he was hired for the defendant, that he had acquired any habit which detracted from his competency. At the time of this work, however, he was not temperate in strong drink. He was drunk on the day of the accident. The testimony did not show directly, though it is an inference which a jury might make fairly, that his condition in that respect was a cause of the injury to the plaintiff; for they might well infer that, if his faculties had been without confusion from strong drink, he would not have put the lads Foreman and Churchill, who were deficient in judgment and strength, to do a work requiring discretion and power, or, doing so, he would have inspected the result of their work before using it. There was evidence that the defendant or its agent Colby knew of the habits of Westman, and therefore of his incompetency. The court held that the defendant was negligent towards the plaintiff in retaining Westman in its service after his habit of drinking to drunkenness was known to Colby, its general agent for hiring and discharging men of the class of Westman.

The New York court again, in *Baulic v. Railway Co.*, 59 N. Y. 336, had occasion to discuss the question particularly of the master's duty in respect to the selection of his servants, continuing them in its service after knowledge of negligent acts on their part, and the effect and character of proof of such knowledge and acts of the servant. The general doctrine is thus stated: "It must be regarded as too firmly established, as well upon principle as by authority, to be now questioned, that if the master is wanting in proper care in the selection of servants, and negligently or knowingly employs or retains in his service those who are incompetent and unfit for the duties to which they are assigned, he is liable to respond to other employés and servants engaged in the same serv-

exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge.<sup>2</sup>

ice who may sustain damage by reason of such incompetency and unfitness. And when the master is a corporation, necessarily acting by and through agents, the acts of its general agents, charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment. It is equally well settled that when reasonable precautions and efforts to procure safe and skillful servants are used, and, without fault, one is employed through whose incompetency damage occurs to a fellow servant, the master is not liable,"—citing *Laning v. Railway Co.*, 49 N. Y. 521; *Flike v. Railway Co.*, 53 N. Y. 549; *Wright v. Railway Co.*, 25 N. Y. 562; *Tarrant v. Webb*, 18 C. B. 797; *Ormond v. Holland, El. Bl. & El.* 102. The complaint in this case was that the servant, who was a switchman at a junction or intersection of two roads, was retained in the service of the defendant, and in the same capacity, after he had shown himself unfitted for the position, and unsafe to be trusted in it. To sustain the complaint in this respect, proof was given of a single occurrence, in respect to which it was claimed an accident similar to that which resulted in the death of the deceased was occasioned by his negligence and carelessness, and that knowledge of the facts was brought home to the general agents of the defendant. The court say, in respect to such proof:

"When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employés, whose acts and

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<sup>2</sup> *Blake v. Maine Cent. R. Co.*, 70 Me. 63; *Lawler v. Railroad Co.*, 62 Me. 467; *Harper v. Railroad Co.*, 47 Mo. 567; *Moss v. Railroad Co.*, 49 Mo. 167.

It is not negligence per se to employ a boy 12 years of age to operate an elevator in a store. *Smille v. St. Bernard Dollar Store*, 47 Mo. App. 402.

When, however, it is not shown but that due care was exercised in the choice of a servant, no presumption of the latter's unfitness arises afterwards. The presumption is

omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry.

"A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow servants of the employé for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow servants. The duty of a railroad corporation is to exercise due—that is, ordinary—care in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities, and the consequences that may result from the want of competence, skill, or care in the performance of their duties."

The court, after stating that it must be assumed that when he was employed he was competent, skillful, sober, and temperate, and when in the performance of his duties he remained so, with the single exception referred to, then proceed to say: "If it be conceded that the negligence of the servant upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him, upon pain of being charged with neglect and want of due care in retaining him in its service. An individual who, by years of faithful service, has shown himself trustworthy, vigilant, and competent, is not disqualified from further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness, and omission to exercise the highest degree of caution and presence of mind. The fact would

that, if competent and fit when he enters the service, he remains so.<sup>8</sup>

The master, in the exercise of his duty of supervision over only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employes of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service; as, when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not per se tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might, from inattention, omit to sound the whistle or ring the bell at a road crossing; but such fact would not tend to prove him a careless and negligent servant of the company."

The court further proceed: "To justify a recovery by the plaintiff from this single instance, there must be inferred not only the carelessness as a characteristic of the switchman, and his consequent unfitness for that particular service, but the want of due care in the corporation in investigating the occurrence, and determining upon the retention of the man. The question in this case was whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant, in the exercise of proper care and prudence such as the law enjoins, to discharge this switchman." The court declared that there was not sufficient evidence to carry the case to the jury.

The employer is bound to see that its servants, in occupations requiring the exercise of skill, are reasonably skillful; but this duty is discharged if the master or foreman employing them exercised ordinary care therein. Whether such employé was sufficiently skill-

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<sup>8</sup> Michigan Cent. Ry. Co. v. Gilbert, 46 Mich. 176, 9 N. W. 243.

the conduct of his servants, to ascertain whether they should be retained, must consider the nature of the service, as well as the dangers attending the employment or re-

ful, as well as the question of ordinary care in selecting him, are questions for the jury. A single act of carelessness causing an injury is not sufficient in itself to prove incompetency. *Melville v. Railway Co.*, 48 Fed. 820.

In *Haworth v. Seevers Manuf'g Co.* (Iowa) 51 N. W. 68, where a platform or scaffold was improperly constructed, it was held proper to instruct the jury that if the defendants were incompetent from want of skill to direct the work, and did not employ a skillful foreman, that might be negligence. The fact that workmen who were engaged in constructing the appliance or structure were generally engaged in other employments might be considered upon the question of their competency, and the master's duty in that respect.

It is not negligence to employ an inexperienced brakeman 20 years of age, where proper direction is given him in the discharge of his duties. *Gorman v. Railway Co.*, 78 Iowa, 509, 43 N. W. 303.

Say the New York court in *Coppins v. Railway Co.*, 122 N. Y. 563, 25 N. E. 915: "No distinction exists in principle between permitting the use of defective machinery and permitting employes to habitually disregard the safeguards that have been provided to insure the safe running and operation of trains. The defendant's duty to the plaintiff, so far as reasonable care would accomplish it, was to employ only competent men in the management of its road. A competent man is a reliable man; one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Hence, incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and, although he may be physically and mentally able to do well all that is required of him, his disposition towards his work, and towards the general safety of the work of his employer, and to his fellow servants, makes him an incompetent man." In this case it appeared that the employé frequently neglected his duty in observing the condition of switches at a certain point, to the knowledge of the company.

In *Harper v. Railway Co.*, 47 Mo. 567, where a conductor was injured in consequence of the mismanagement of the locomotive by

tention of unfit or incompetent persons. A closer supervision over the habits and conduct of an engineer is required than over a common laborer, for the very plain and obvious reason that the dangerous consequences of neglect are likely to be so much greater in the one case than in the other.

a fireman who had been placed in charge of the engine by the agents of the company, the company was held responsible on the ground of neglect of duty in the employment of competent and skillful servants in the execution of their business.

In *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 513, the court very sensibly state the duties of the master in respect to the employment of servants. Speaking with reference to railroad corporations, the court say: "The charge of looking after various divisions of business and of local management must of necessity be given to many subordinates of greater or less authority, and each of these must be intrusted with considerable discretion, not only in managing the business, but also in choosing their inferiors in position. It is incumbent on the principal, whether individual or company, to have safe rules of business, and to use care in selecting such agents as are immediately appointed. It is also a duty to remove such persons, or to change such regulations, as they have reason to believe unfit. But, until informed to the contrary, they have a right to trust that an agent or officer, carefully chosen, will use good judgment in making his own appointments and doing his own duties; and they have a right to rest upon that belief until, in the exercise of that general vigilance which devolves upon themselves, they find they have been mistaken; and, as all men are liable to errors, no one can be bound to treat an agent as incompetent unless for some error or misconduct going to his general fitness for the place."

This case, as to the facts, is similar to *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101. The court, however, arrive at a different and more nearly correct result than the Indiana court, and are sustained by the New York courts in recent cases. The plaintiff, an engineer of a passenger train, was injured by reason of a collision with a freight train. The conductor of the freight train had been running under telegraphic orders. At Buchanan he received an order which made it his duty to wait for the other train. Either failing to read it or understand it, and omitting to

The greater the danger, the greater the care, is the rule.<sup>4</sup>

The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency, and bringing them home to the knowledge of the master or company;<sup>5</sup> or by showing them

give it to his engineer, which was his duty under the rules, he started his train, and hence the collision. The facts alleged to show incompetency on his part, known to the company, were that he was put on the list of conductors about eight months before the accident, after having been employed as brakeman for a somewhat longer period; and that on one occasion, having made a mistake as to the rights of a passenger upon a freight train, he had carried him beyond the place for which he had a ticket. He complained of his own want of knowledge, and told the agent at Michigan City, who had appointed him, that he did not feel as if he was competent to run a train. He was advanced from brakeman in accordance with a uniform practice. He had maintained a good standing, and no fault had been found except the single instance told. The court say: "This had no tendency whatever to show unfitness. It rather tended to show a conscientious desire to correct his mistakes, and obtain more complete knowledge of his duties." It was held that the evidence did not show incompetence, or that there was any reason to suppose it.

The courts generally do not agree with the Indiana court upon the question of promotion of faithful, competent, and vigilant employés. It would seem, upon every sound principle of reason and justice, that such is a more prudent course. The company have thus at hand peculiar knowledge of the fitness of its servants for the position, which no inquiry could give them. They are better able to judge of the servant's fitness than either courts or juries. The practice of promotion was approved in *Texas & N. O. R. Co. v. Berry*, 67 Tex. 238, 5 S. W. 817; *Haskin v. Railroad Co.*, 65 Barb. 129.

<sup>4</sup> *Hilts v. Railway Co.*, 55 Mich. 440, 21 N. W. 878.

<sup>5</sup> *Michigan Cent. Ry. Co. v. Gilbert*, 46 Mich. 179, 9 N. W. 243;



to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought

Pittsburgh, F. W. & C. Ry. Co. v. Ruby, 38 Ind. 294. See, also, note 1.

The supreme court of Indiana, in Pittsburgh, F. W. & C. Ry. Co. v. Ruby, 38 Ind. 294, also held that, for the purpose of showing that the officers of a railroad corporation did not exercise due care in the employment and retention of competent servants, and for the purpose of charging such corporation with notice of the incompetency of its employes, specific acts of negligence or unskillfulness might be proved. That was a case of alleged carelessness of a conductor in leaving a switch open, thereby causing a collision. About a year before, he had left a switch open, causing a train to leave the track, and, a short time before, he had neglected to obey an order to wait at a station for a train passing east. The court in that case, after two trials, sustained a verdict for the plaintiff.

The case of Evansville & T. H. R. Co. v. Guyton, 115 Ind. 450, 17 N. E. 101, perhaps goes as far as any other case, and fully as far as the law will approve, in establishing affirmative duties to be performed by the master in selecting and ascertaining the qualifications of his servants. The court affirm emphatically the doctrine of Baulic v. Railway Co., supra, that the idea is not to be tolerated that the law will pronounce a person, who is shown to be qualified by years of efficient service, incompetent because of a single mistake or act of forgetfulness. Yet the fact, however, cannot be disguised, that a single act, with the circumstances surrounding it, where the circumstances are so overwhelming as the bringing of two trains of cars running at a high rate of speed into collision on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned. The servant in question had been promoted from the position of brakeman to that of a conductor, and had been very efficient and capable and vigilant; yet the court say "that because he was an efficient and competent brakeman, and fit for promotion, it does not follow he was also competent to take charge of and run a wild train." It was held that whether the company should have exercised some affirmative act or duty, notwithstanding his previous service, to ascertain his qualifications, or, rather, whether

to his notice.<sup>6</sup> But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of.<sup>7</sup> So it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant, to leave it to the jury to determine whether they did come to the knowledge of the master, or would have come to his knowledge if he had exercised ordinary care.\* In such case the presumption that the master had discharged his duty may be overcome to such an extent as to call upon him to rebut the proof made showing his negligence.<sup>8</sup>

If an employer either knew, or might, by the exercise of it was wise for a railroad company to fill vacancies by advancing from lower positions employes known to be skillful and deserving, was a question of fact for the jury. The servant's fault was in neglecting an order which he understood when he received it, whereby a collision took place. The court does not intimate what affirmative act the company should have done. It can hardly be surmised what further act they could have done. The fault on the part of the servant was simply one of momentary forgetfulness, common to all mankind.

<sup>6</sup> *Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Michigan Cent. Ry. Co. v. Gilbert*, 46 Mich. 179, 9 N. W. 243.

In *Houston & T. C. Ry. Co. v. Patton* (Tex. Sup.) 9 S. W. 175, it was held that a finding that an engineer was incompetent, and that the company was chargeable with notice thereof, may be sustained upon evidence showing that he was careless in handling his engine in making couplings and running trains, and that he had been reported to the conductor for this; also, that his engines habitually came into the shop out of repair, with defects that would not have occurred had he exercised proper care; and this may be so found although there was testimony on the part of the defendant that he was a safe and careful engineer.

<sup>7</sup> *Michigan Cent. Ry. Co. v. Gilbert*, 46 Mich. 179, 9 N. W. 243.

<sup>8</sup> *Id.*

<sup>8</sup> *Hilts v. Railway Co.*, 55 Mich. 444, 21 N. W. 878.

due care, have learned, that an employé was accustomed to the habitual use of intoxicating liquors to excess, and thereafter either placed or retained such employé in a responsible position in a hazardous business, where others might be exposed to peril and danger by a neglect or failure of duty on the part of such employé, he would certainly be guilty of culpable negligence, and liable, in case of injury caused thereby to another, for the consequences thereof.<sup>9</sup> And when such habit on the part of the servant has continued for a length of time covering several months, while in the master's employ, and is observed and known by employés and others coming in contact with him, and by inquiry and observation the master would have learned of it, the omission to make the inquiry, or to observe his condition or his habits in this respect, may be negligence fully as culpable as though he had employed a notoriously incompetent person without inquiry.<sup>10</sup>

<sup>9</sup> *Kean v. Detroit Copper, etc., Mills*, 66 Mich. 284, 33 N. W. 395; *Hilts v. Railway Co.*, 55 Mich. 437, 21 N. W. 878; *Lanling v. Railway Co.*, 49 N. Y. 521.

<sup>10</sup> *Hilts v. Railway Co.*, 55 Mich. 437, 21 N. W. 878.

In *Gilman v. Railroad Co.*, 13 Allen, 433, it was held: "If a flagman employed by a railroad corporation is an habitual drunkard, and is usually intrusted with the management of a switch, and these facts are known, or by the use of due care would be known, by the officers of the corporation, and he, through intoxication, fails properly to adjust a switch, whereby an accident happens to a person employed by the corporation to repair its cars, the corporation will be responsible in damages, although due care was used in the original selection of the flagman, and a proper local agent is employed, with authority to hire and superintend such servants as may be necessary, and by the rules of the company it is the duty of another person to manage the switch. If a person employed at the time of an accident, alleged to have been caused by his negligence, was an habitual drunkard, evidence that he was generally reputed to be so in the place where he lived is competent, for the

The habit of intoxication is one of the most frequent causes that render otherwise competent servants incompetent. Its prevalence suggests that it may exist among formerly prudent, and even temperate, men; and therefore it may not always be said that it ought not to be, or was not, anticipated. It counteracts skill. It transforms prudence and caution into rashness and recklessness. It must therefore be the master's duty to be always on the alert,—and more especially in the case of railroad service, or other service equally perilous,—and exercise a constant supervision over the conduct and habits of employés, and to discharge at once any and all who may be found to have formed the unfortunate habit.

The facts may be such as to dispense with proof of the master's knowledge of the servant's unfitness; and this is so where it is shown that the servant is in fact incompetent within a few weeks after his employment, and there is no proof of the care which was exercised by the master at the time of the employment. The presumption that the master had done his duty is thus overcome, and he must show affirmatively that he exercised proper care.<sup>11</sup> But ordinarily, when it is not shown but that the servant was competent at the time of the employment, and he becomes incompetent, or indulges in a habit which renders him incompetent, notice of such incompetency or habit must be brought home to the master, or the incompetency or habit must be so notorious as to charge the master with knowledge.<sup>12</sup>

The responsibility is not merely for the negligence of the servant, but for the master's. While the duty of the purpose of showing that his intemperate habits ought to have been known to the officers of the corporation."

<sup>11</sup> Lee v. Railway Co., 87 Mich. 574, 49 N. W. 909.

<sup>12</sup> Lee v. Railway Co., 87 Mich. 574, 49 N. W. 909.

master requires great care—great, because of the perilous nature of the employment, but still ordinary care under the circumstances—in the employment of servants, and the institution of due inquiry to ascertain their character and qualifications, yet it has been said that, when suitable and competent persons have been employed, the same degree of diligence is not required to ascertain if they remain competent.<sup>13</sup> Yet I apprehend that it was not intended to decide that the degree, as one of the three recognized by law, is different, but simply that less diligence would satisfy the requirements of the exercise of ordinary care.

What amount of proof may establish sufficiently to submit the question to a jury whether a servant is in fact incompetent, or the master ought to have known of such incompetency, is not free from difficulty. We have seen that specific acts of carelessness or incompetency may be shown as tending to show notice on the part of the master, but not for the purpose of showing or tending to show incompetency. Yet this doctrine is repudiated by some courts,<sup>14</sup> while in addition to the cases before cited as sustaining the rule may be added *Pittsburg, etc., Ry. Co. v. Ruby*<sup>15</sup> and *Baulic v. Railway Co.*<sup>16</sup> In the latter case the opinion is very elaborate, and its reasoning commends itself to the judgment.

Whatever may be the rule as to notice in the respect stated, it has been quite uniformly held that a single act of incompetency or carelessness is not sufficient to sustain

<sup>13</sup> *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Blake v. Railway Co.*, 70 Me. 64.

<sup>14</sup> *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

<sup>15</sup> 38 Ind. 294. See note 5.

<sup>16</sup> 59 N. Y. 356. See note 1.

the charge of incompetency of the servant, or notice thereof to the master.<sup>17</sup>

In *Baltimore Elevator Co. v. Neal*<sup>18</sup> it was said: "Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in the employment, must be habitual, rather than occasional or of such a character as to render it imprudent to retain him in the service. A single exceptional act will not prove a servant incapable or negligent."

It has also been held by some courts that the reputation of the employé might be shown as tending to show either knowledge on the part of the master of the servant's incompetency, or negligence on the part of the master in not ascertaining the fact. But this only applies when the

<sup>17</sup> *Couch v. Coal Co.*, 46 Iowa, 17; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Huffman v. Railway Co.*, 78 Mo. 50.

<sup>18</sup> 65 Md. 438, 5 Atl. 338; *Huffman v. Railway Co.*, 78 Mo. 50.

*Harvey v. Railway Co.*, 88 N. Y. 481, was where a switchman neglected to adjust a switch. He had been employed in different capacities for years, and as a switchman for several months, and had proven faithful, competent, and efficient. It was held that as his failure to close the switch did not arise from inability to perform the duties, but was the result of inattention and carelessness, this was not sufficient to show any neglect on the part of the company, either in employing him or retaining him in its service, or incompetency on the part of the servant.

In *Burke v. Railway Co.*, 69 Hun, 21, 23 N. Y. Supp. 458, "the negligent switchman was 17 years old, strong, robust, with average intelligence, and physically able to perform his duties. The service required of him was not complicated or difficult to perform. In attempting to perform his duty at the time of the accident, he was suddenly seized with the mistaken belief that the switch was set wrong, and impulsively threw it back. The court conclude that there was not sufficient to charge the defendant with negligence in employing such infant servant, or having him in charge of the station at the time of the accident."

servant is found to be in fact incompetent.<sup>19</sup> Of course, when reputation is relied upon, it must be so well known and general that inquiry would have disclosed it. This doctrine of reputation was applied to great length, it seems to me, in the case of *Monahan v. City of Worcester*.<sup>20</sup> The facts were that plaintiff was at work in a trench. McLoughlin, the alleged incompetent servant, who was 62 years old, physically weak, with hearing and eyesight somewhat impaired, was engaged in wheeling brick upon a handbarrow to the edge of the trench, and, by improper handling, the barrow tipped, and a portion of the bricks was emptied into the trench, and upon the plaintiff, causing him injury. There was not the slightest evidence that either his defective hearing or defective eyesight had aught to do with the tipping of the barrow; on the contrary, it appeared that carelessly, perhaps, he struck a rail with the wheel of the barrow. Nor did it appear that, though physically weak, he was not strong enough to perform the service at which he was engaged, or that the tipping of the barrow was a result of his want of strength. The employment was one of an ordinary character, not essentially different from farm or ordinary laborer's work. It was not "hazardous," as the term is used in the law, as distinguished from "ordinary," employment. The same measure of care was not required in selecting competent servants as in a hazardous employment. There was no reason why any different rule should apply than is uniformly applied to the furnishing of ordinary tools and implements. Yet in this case the master was found to be negligent in having

<sup>19</sup> *Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228; *Gilman v. Railway Co.*, 13 Allen, 433; *Chicago, etc., Ry. Co. v. Doyle*, 18 Kan. 58.

<sup>20</sup> 150 Mass. 439, 23 N. E. 228.

employed an incompetent servant, whose incompetency would have been disclosed to the master from his reputation, if the master had made proper inquiry. Conformity to so strict a rule precludes all charity. It limits the days and years of man's usefulness, and when he may labor at ordinary employments to obtain subsistence for himself and those dependent upon him. It subjects those who employ him to unreasonable penalties. It adds to the misfortunes of those who are in the decline of life.

Incompetency of servants, and knowledge thereof by the master, may sometimes be inferred from the particular facts and circumstances. Such was the case in *Wabash Ry. Co. v. McDaniels*,<sup>21</sup> where a boy, only 17 years of age, though bright and intelligent, was filling the responsible position of train dispatcher,—not a general dispatcher, but limited as to his field of duties. His experience was that of a messenger boy of one year's service when he learned the art of telegraphy. It was held that the facts were sufficient to sustain a verdict of his incompetency, and that

<sup>21</sup> 107 U. S. 454, 2 Sup. Ct. 932.

*Sutherland v. Railway Co.*, 125 N. Y. 737, 26 N. E. 609, was where the offending servant was a telegraph operator a little over 17 years of age, with more than a year's experience, and who had discharged his duties satisfactorily and intelligently. The court say: "We think, under the circumstances, the jury could not be permitted to infer that such servant was incompetent, in fact, from his age only, or that the company was negligent in employing him, or to speculate whether, if the operator had been a man of mature years or judgment, he would have been less likely to have committed the mistake which Johnson did."

In *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, the jury were permitted to determine as to the competency of a young man as an operator from his limited experience, and predicate a want of care on the part of the master in selecting him, and retaining him in such position.



the master ought, from these facts, to have known of it.

So, where an employé was shown to be incompetent, the master's knowledge was presumed from the following facts: The servant, a young man of about 21 years, applied for position as a brakeman, to a general train dispatcher, who informed him, if he went to a place where it was the custom of the company to have extra men to supply the place of those who were sick or temporarily absent, he might get a job. He went there, and reported to the yardmaster. His name was entered upon the books as an extra. His experience consisted in having made two or three trips over the road prior to the accident. The court held that it thus appeared that no effort was made to ascertain his experience or qualifications for the very responsible position of brakeman; and this was sufficient, at least, to shift the burden of proof upon the defendant to show what diligence had in fact been used.\*

It has been held that, when the master has been notified of the incompetency of his servant, he has a reasonable time thereafter to cause his discharge, and that for an accident occurring in the mean time, attributable to the incompetency of such servant, the consequences thereof are not chargeable to the master.<sup>22</sup>

\* Mann v. President, etc., Delaware & H. Canal Co., 91 N. Y. 495.

<sup>22</sup> Ross v. Chicago, etc., Ry. Co., 8 Fed. 544.

When a master employs a competent and careful servant, he has a right to rely upon the presumption that he will continue careful and skillful, and, when notified that he has become careless, he is not ordinarily bound to discharge such servant without an investigation into such charge, unless such notice is accompanied by such evidence as leaves no reasonable doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed, without investigation, upon a charge of carelessness, would be a harsh one, and would often result in great injustice to employés. Lake Shore & M. S. Ry.

To discharge employes for disobedience of positive orders or rules has been held to be a duty on the part of the master. Thus, where the company had notice that its engineers were in the habit of giving control of their engines to firemen, against positive orders of the company, it was their duty to discharge the offending servants, and an omission so to do was held negligence, on the ground of retaining an employé after having knowledge of his incompetency.<sup>24</sup>

When actual notice to the employer of the incompetency of an employé, or knowledge of acts that suggest incompetency, is relied upon, it must be shown to have been received by one who has authority in the premises, or whose duty it is to convey it to one having such authority. Knowledge by one not sustaining such relation is not sufficient.<sup>25</sup>

Co. v. Stupak, 123 Ind. 210, 23 N. E. 246; Ohio & M. R. Co. v. Collarn, 73 Ind. 261; Lake Shore & M. S. Ry. Co. v. Stupak, 108 Ind. 1, 8 N. E. 630; Indiana, B. & W. Ry. Co. v. Dailey, 110 Ind. 75, 10 N. E. 631; Chapman v. Railway Co., 55 N. Y. 579; Moss v. Railway Co., 49 Mo. 167; Blake v. Railway Co., 70 Me. 60; McDowell v. Railway Co. (Ky.) 5 S. W. 413; La Rose v. Bank, 102 Ind. 332, 1 N. E. 805.

<sup>24</sup> Ohio & M. R. Co. v. Collarn, 73 Ind. 261.

<sup>25</sup> Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

The mere fact that the foreman of defendant's roundhouse had heard that an engineer was drinking too much was held to be sufficient, from which the jury might infer the defendant knew of his habits. Williams v. Railway Co., 109 Mo. 475, 18 S. W. 1098.

In an action against a railroad company for the death of a foreman, caused by the negligence or incompetency of one of defendant's telegraph operators, evidence that the operator was not qualified for the place is not sufficient to charge the company, where it does not appear that it knew, or by reasonable diligence could have known, of such incompetency. Knowledge by a chief train dispatcher of the incompetency of a station agent and telegraph operator employed by the same company, but without authority on the

Notice to the master mechanic, whose duty it is to employ or discharge the incompetent servant, will be notice to the master.<sup>26</sup>

In a recent case in Maine, the evidence of incompetency was that, only, of one witness, in substance that the fellow servant (a brakeman) was slow, lazy, and not fit for the service. He was so slow, and witness had so informed the agent of the employer. In answer to a question, "if the fellow servant was competent and careful in the performance of his duties," the witness replied, "Yes; he was always careful about his work." It was held that negligence could not be charged to the master in retaining the servant in service.<sup>27</sup>

A very peculiar ruling was made by the supreme court of Massachusetts in *Keith v. New Haven & Northampton Co.*<sup>28</sup> The jury were permitted to consider the appearance and conduct of the inspector, who was called as a witness, to aid them in determining whether he was a person of suitable qualifications and intelligence to be intrusted with such a responsible duty. This was held proper. The court say: "What his appearance and conduct were, and how they would be likely to impress a jury, are matters not reported, and from their nature cannot be." It is impossible for us to say that, in addition to the evidence, his appearance and conduct in the presence of the jury might not be legally sufficient to satisfy them that he was an incompetent person. The court justify this view by analogy to the decision of the court in *Com. v.*

part of the dispatcher to hire or discharge such servants, cannot be imputed to the company. *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175.

<sup>26</sup> *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261.

<sup>27</sup> *Corson v. Maine Cent. R. Co.*, 76 Me. 244.

<sup>28</sup> 140 Mass. 175, 3 N. E. 28.

Emmons,<sup>29</sup> where a jury were permitted to find from the appearance of a young man, without other evidence, that he was not 21 years old, and such proceeding was allowed. In *Peaslee v. Fitchburg R. Co.*<sup>30</sup> the same court, while not repudiating their views in the former case, declined to apply them. They say: "The exceptions do not show, and it cannot be presumed, that the appearance and conduct of the party before the jury furnished evidence that the defendant knew, or ought to have known, that he was incompetent." The views of the Massachusetts court were repudiated by the supreme court of Maine as absurd.<sup>31</sup> The court say: "If the jury undertook to decide that Arnold was an unfit person to be employed as a brakeman, on account of what they saw or supposed they saw or could read in his face and manner while testifying before them as a witness, they fell into a very grave error. As well might a jury find a man guilty of murder because in their opinion they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon, not even against a railroad corporation."

When the injured servant knew of the incompetency of the offending servant as well as the master, or had equal knowledge, and, notwithstanding such knowledge, continued in the employment without objection, he waives the negligence of the master in this respect.<sup>32</sup>

<sup>29</sup> 98 Mass. 6.

<sup>30</sup> 152 Mass. 155, 25 N. E. 71.

<sup>31</sup> *Corson v. Maine Cent. R. Co.*, 76 Me. 246.

<sup>32</sup> *Laning v. Railway Co.*, 49 N. Y. 525; *Wright v. Railway Co.*, 25 N. Y. 566; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 563.

One of the rules of the common law still in force is as follows: "If an employé knows that another employé is incompetent or habitually negligent, or the materials with which he works are defec-

The authorities upon the question of the master's duty to furnish an adequate number of servants to properly and safely perform the required service are comparatively few in number. The doctrine, however, is well settled that the master owes a duty to his servant to exercise reasonable care in supplying for the performance of the work an adequate number of fit and competent servants, and that for a failure of duty in this respect he is responsible in damages to a servant injured in consequence thereof. The contract is that the servants shall not be exposed to any

tive, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom. *Kansas Pac. Ry. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780; *Kroy v. Railway Co.*, 32 Iowa, 357; *Laning v. Railway Co.*, 49 N. Y. 521; *McQueen v. Railway Co.*, 30 Kan. 689, 1 Pac. 139; *Jackson v. Railway Co.*, 31 Kan. 761, 3 Pac. 501; *Assop v. Yates*, 2 Hurl. & N. 768; *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 548; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *United States Rolling-Stock Co. v. Wilder*, 116 Ill. 100, 5 N. E. 92; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Lake Shore & M. S. Ry. Co. v. Knittal*, 33 Ohio St. 468.

In *United States Rolling-Stock Co. v. Wilder*, 116 Ill. 109, 5 N. E. 92, the duty of the servant was thus aptly expressed: "All that the law demands of one thus employed is that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow servants; and if, from either of these sources of information, he finds one of them, from incompetency or other cause, renders his own position extrahazardous, it is his duty to notify the master, and, if the latter refuses to discharge the incompetent or otherwise unfit fellow servant, the complaining servant will have no other alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned. The case suggested, it will be perceived, is one of mutual negligence. On the part of the

increased risk by reason of a lack of adequate help.<sup>33</sup> What is a sufficient number, of course, must depend upon the character and location of the employment to a great extent, and be determined ordinarily by the usage in similar employments, under similar circumstances, which experience has demonstrated to be ordinarily sufficient. When the master's duty is performed in this respect is a question of some importance, and not free from difficulty. The mere employment of a sufficient number, and assignment to them of their respective duties, will not meet the full

master, it is negligence to retain the incompetent servant in his employ. It is, on the other hand, negligence in the complaining servant to continue longer in the master's service, unless he intends to run the extra hazard himself."

In *Laning v. Railway Co.*, supra, the court say: "But it is apparent that the plaintiff knew as well as, indeed far better than, any one else, the habits of Westman, and his particular condition on that day. The strength of the affirmative testimony on both of these points is from the plaintiff's mouth. The plaintiff knew that the building of this scaffold was going on.. He knew that neither of the persons who had built the other two safe scaffolds was engaged in the erection of the third, which fell; for those men were occupied where he was, a short distance away from it. He knew that men under the direction of Westman were putting it up, and, as they were not of the three persons who had together built the two scaffolds, he knew that Westman had taken others for the third. He knew that Westman was drunk on that day and at that time. If it was negligence in Coleby and the defendant to suffer Westman, in that state, to remain in the direction and control of men and work, was it not negligence in the plaintiff to remain in defendant's employ, subject to Westman's directions, and liable to evil results from work done under his supervision,—likely to be an insufficient and negligent supervision, from his perceptions being clouded and dulled by drink?"

<sup>33</sup> *Flike v. Boston & A. R. Co.*, 53 N. Y. 550; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541.

measure of the master's duty. He must see that they are at the place of service, prepared for the performance of their duties. When such is the fact,—when they are employed, and actually present, prepared to do their work,—then I think the master's duty is performed; and if, thereafter, they perform their duty in a negligent manner, being colaborers with other servants in the master's employ, in the common employment, the master is not responsible for the consequences of their negligence to a co-employé. Such negligence becomes that of a fellow servant. This is the view taken by the court of appeals of New York in *Flike v. Boston & A. R. Co.*,<sup>34</sup> which is a leading case upon this subject.

It is understood, of course, that the incompetency of the servant in all cases, in order to charge the master, was the proximate cause of the injury. The mere fact that the servant was incompetent, and the master had knowledge thereof, is of no importance, unless therein is found the cause of the injury, or a cause contributory thereto, without which it might have been avoided or not have happened.\*

\* 53 N. Y. 550.

\* *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; *Hayes v. Western R. Corp.*, 3 Cush. 270; *Johnston v. Pittsburgh & W. R. Co.*, 114 Pa. St. 443, 7 Atl. 184.

In *Gulf, C. & S. F. Ry. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. 706, it was held that, though the fireman was not qualified to operate the engine, and plaintiff did not know it, no recovery could be had, except for the fireman's negligence; and if he handled the engine as carefully as an engineer of ordinary prudence would have done under the circumstances, then plaintiff would not be entitled to recover, even if the jury should believe he was not qualified.

## CHAPTER V.

### MASTER'S DUTY (Continued)—TO PROMULGATE RULES.

**Master, when the nature of the business requires it, must establish and promulgate rules, p. 72.**

**When there may be a question whether the nature of the business requires the performance of this duty, it is to be determined by the jury, p. 73.**

**This duty one of ordinary care, p. 74.**

**Whether a rule is a reasonable one is a question of law for the court, p. 75.**

**Special conditions may change this rule, p. 76.**

**Whether a particular rule should have been made cannot arbitrarily be left to a jury. There must be sufficient proof upon the question of its propriety, p. 76.**

**What may amount to such proof, p. 76.**

**Held in New York that master is not required to see to it personally that notice of the existence of a rule comes to the knowledge of all those to be governed by it, p. 77.**

**His duty is performed in this respect by the employment of competent servants to receive and transmit the rule, p. 78.**

**This doctrine not approved by some courts, p. 80.**

**An employe cannot dispute the reasonableness of a rule or regulation, p. 85.**



**Yet, if to obey the order is plainly to imperil life or limb, the servant may refuse obedience, p. 86.**

**But cannot so refuse upon the ground that the duty thus required is dangerous, p. 86.**

**If the servant knows the act required to be unlawful, he is justified in refusing obedience, p. 86.**

**An habitual disregard or violation of a rule, known to the master, may have the effect to determine that requiring obedience to the rule has been waived, p. 86.**

When the nature of the business is such as to require it, it is the duty of the master, which the law imposes upon him, as due to his servants engaged therein, to exercise reasonable care and diligence in making and promulgating rules which, if faithfully observed, will give them reasonable protection from injury.<sup>1</sup>

<sup>1</sup> *Abel v. President, etc., D. & H. C. Co.*, 103 N. Y. 581, 9 N. E. 325; *Slater v. Jewett*, 85 N. Y. 62; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171; *Sheehan v. New York Cent. & H. R. R. Co.*, 91 N. Y. 339; *Dana v. New York Cent. & H. R. R. Co.*, 92 N. Y. 639; *Corcoran v. Delaware, L. & W. R. Co.*, 126 N. Y. 673, 27 N. E. 1022; *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57; *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 234; *Cooper v. Railway Co.*, 44 Iowa, 134; *Wolsey v. Railway Co.*, 33 Ohio St. 227; *Illinois Cent. Ry. Co. v. Whittemore*, 43 Ill. 420; *Pittsburgh, C. & St. L. Ry. Co. v. Henderson*, 37 Ohio St. 549; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Hough v. Railway Co.*, 100 U. S. 213; *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467; *Ohio & M. Ry. Co. v. Collarn*, 73 Ind. 261; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Cumberland & P. R. Co. v. State*, 44 Md. 283; *Ford v. Fitchburg R. Co.*,

It may be a question whether the business is of that character and magnitude that this duty devolves upon

110 Mass. 240; *Lake Shore & M. S. Ry. Co. v. Lavalley*, 36 Ohio St. 221

It is the duty of a railroad company to frame and promulgate such rules and schedules for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them. *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514. When the schedule for the moving of trains is departed from, such orders must be issued by the company as will afford reasonable protection to employes engaged in running its trains. *Id.*

Whether a railroad company has been guilty of negligence to its employes in the use of certain orders and signals for the movements of its trains cannot be determined by proof that another railroad has adopted a better system, where that in use, if obeyed, is reasonably well calculated to secure the safety of its employes. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. 324.

It is error to permit an employé to show what his instructions were as to flagging a train, when he was not injured while performing such service. *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. St. 324, 13 Atl. 205.

Where the rules of a railroad company require car repairers to see that they are protected by a certain flag when under and between cars, and require all employes to acquaint themselves with the rules, and keep a copy of them, and such rules are posted on bulletin boards, and printed on the back of time-tables, and kept for distribution at all points, where employes can get them, such rule is sufficient for the protection of a car repairer, working under a car, though it does not expressly prohibit other servants from moving other cars against cars protected by the flag. *Corcoran v. Delaware, L. & W. R. Co.*, 126 N. Y. 673, 27 N. E. 1022.

Though a railroad company promulgated no special printed rule relating to the duty of employes to guard one of their fellows while at work under a car upon its tracks while in use, yet when it has been the practice so to do, and such practice is known and understood generally by the employes, it becomes a part of common law among such, and obligatory upon them. *Luebke v. Railway Co.*, 63 Wis. 91, 23 N. W. 136. The facts in the case were that, while the plaintiff was under the car, three trainmen in the employ of the

the master, and, in case of doubt, this question should be determined by the jury.<sup>2</sup>

The duty on the part of the master is one of the exercise of ordinary care only, and to anticipate and guard against such accidents and casualties as may be reasonably foreseen by him, or his managers if he have such, exercising such ordinary care. It cannot be assumed that he or they can, by rule, guard against and prevent every injury to them. The question generally is whether, by the exercise of such prudence and foresight, they could have adopted any precautions against injury to the employés other than such as they did; in other words, whether there were still

defendant were standing by the car, and that it was the duty of each of them, incident to his employment, to act as a watchman to protect the plaintiff from injury. No written or published regulation of the company to that effect was shown, neither did any witness in the employ of the company testify that he had been charged by any officer of the company with the duty of watching for the safety of other employés working under cars upon the tracks; but many such witnesses testified that their duty in that behalf was well understood by them and other employés of the company. It was a sort of common law of the company, obligatory upon its employés, and as thoroughly understood by them as though it had been embodied in the printed regulations, and read by the officers of the company to them. It thus became a rule or custom of the company, as well as an understanding between its employés. The car repairer and such other employés were fellow servants.

The following difference is to be noted between a rule for the convenience of the company and one for the safety of passengers: In the former case the company would be liable, unless the violation was the cause of the accident producing the injury. In the latter it is sufficient to relieve the company that the injury was received in consequence of the violation of the rule; and this, notwithstanding the fact that the negligence of the company's servants was the cause of the injury. *Pennsylvania Ry. Co. v. Langdon*, 92 Pa. St. 21.

<sup>2</sup> *McGovern v. Railway Co.*, 123 N. Y. 289, 25 N. E. 373.

other precautions that would suggest themselves to men of ordinary intelligence and vigilance, having the requisite skill and experience to carry on the particular business or the particular branch thereof.<sup>3</sup>

Whether or not a rule is a reasonable one is purely a question of law for the court. The reason, and a sufficient one, for thus holding, is that, as a question of law, certainty is ascertained. If it be submitted to juries, one jury may hold a rule to be reasonable; the next may hold the reverse.<sup>4</sup>

<sup>3</sup> *Berrigan v. Railway Co.*, 131 N. Y. 582, 30 N. E. 57.

<sup>4</sup> *Vedder v. Fellows*, 20 N. Y. 126; *Illinois Cent. Ry. Co. v. Whittemore*, 43 Ill. 420; *Wolsey v. Railroad Co.*, 33 Ohio St. 234; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 110.

Generally a question of law for the court. *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420; *Vedder v. Fellows*, 20 N. Y. 126; *Tracy v. Railway Co.*, 9 Bosw. 396; *Hoffbauer v. Railway Co.*, 52 Iowa, 342, 8 N. W. 121; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128; *Tullis v. Hassell*, 54 N. Y. Super. Ct. 397. Contra: *State v. Overton*, 24 N. J. Law, 435; *Prather v. Railway Co.*, 80 Ga. 427, 9 S. E. 530.

It may be said that sometimes it is a debatable ground between court and jury, and is so held to be properly a mixed question of law and fact. *Bass v. Railway Co.*, 36 Wis. 459; *Com. v. Power*, 7 Metc. (Mass.) 596; *Day v. Owen*, 5 Mich. 520.

It is practically a question of law in plain cases; for courts would not hesitate to overrule the findings of juries against their own clear views of the reasonableness or unreasonableness of such regulations. There may well be cases of doubt, largely where the facts are in dispute, where the question may, and ought to be, submitted to the jury. *Bass v. Railway Co.*, 36 Wis. 459. But where facts are admitted or undisputed, it is a question for the court. *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 33 Am. & Eng. R. Cas. 497, note.

In an action for injuries to a railroad employé, it is proper to leave to the jury the question whether a rule as to loading lumber on flat cars was sufficient, when faithfully followed, to give reasonable pro-

An exception to this rule was made in *Pittsburgh, C. & St. L. Ry. Co. v. Henderson*,<sup>5</sup> placed upon the ground that the rule in question there was a special one,—in fact, an order suspending in the particular instance a general printed rule; and it was said by the court: "It cannot be affirmed as matter of law that the special order so made was a reasonable one; on the contrary, whether such order was reasonable or unreasonable was a question of mixed law and fact, proper for the determination of a jury, in view of the circumstances under which the order was to be executed, under proper instructions as to the law,"—though it has been held that whether rules are adequate for the safety of the management of trains is a question of fact for the jury.<sup>6</sup> But I apprehend that they must act upon proof, and not conjecture.

Whether the exercise of ordinary care requires the making of a particular rule, applicable to a possible or probable emergency, cannot arbitrarily be left to the determination of a jury. There must be some sufficient proof upon the question, unless the propriety of making and promulgating such a rule is so obvious as to make the question one of common experience and knowledge. The character of the proof should tend to show that such a rule was in operation by other roads, or it should appear from the testimony of persons possessing peculiar skill and experience in the

tection to its employes. *Ford v. Lake Shore & M. S. Ry. Co.*, 124 N. Y. 493, 26 N. E. 1101.

It was held error to submit to a jury the question of the reasonableness of a rule providing for the giving of signals when a train is entering a side track; it not appearing that any railroad company had such a rule, or what its practical effect would be if adopted. *Larow v. New York, L. E. & W. R. Co.*, 61 Hun, 11, 15 N. Y. Supp. 384.

<sup>5</sup> 37 Ohio St. 549.

<sup>6</sup> *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 116.

management and operation of railroads that such a rule was necessary or practicable under the circumstances.<sup>7</sup>

The master's duty is to make and promulgate proper rules. It is not required that the master should see to it personally that notice comes to the knowledge of all those

<sup>7</sup> *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57.

Plaintiff's intestate at night was engaged in coupling cars at a siding. While thus engaged, an engine came from the other end of the siding to draw out other cars for another train, and, in so doing violently backed against the cars where plaintiff's decedent was engaged, causing him injury. There was no rule requiring signals to be displayed indicating trains were being made up, nor were any signals displayed. It was held that whether the defendant was negligent in not establishing such rules was a question for the jury. *Berrigan v. New York, L. E. & W. R. Co.*, 59 Hun, 627, 14 N. Y. Supp. 26. This case was reversed by the court of appeals (131 N. Y. 582, 30 N. E. 57), where it was held that "a railway company is not liable to an employé, for injuries sustained by him, on the ground of its failure to make regulations which might have prevented the accident, where the accident was caused by circumstances which could not have been reasonably anticipated, and where a compliance with the general body of rules, and the exercise of ordinary care by the employé, would have avoided it."

The court say: "The defendant was only bound to use ordinary care in formulating rules, and it is not reasonable to proceed upon the assumption that every injury to an employé can be guarded against and prevented by making such rules. It was the duty of the defendant to anticipate and guard against, by rules or otherwise, only such accidents and casualties as might reasonably be foreseen by the managers of the corporation, exercising ordinary prudence and care. The question here is whether, by the exercise of such prudence and foresight, they could have adopted any precautions against injury to the employés other than such as they did, or whether there were still others that would suggest themselves to men of ordinary intelligence and vigilance. They had a body of rules embracing every case that was supposed to need regulation. One of these rules provided that, when a locomotive was moving

to be governed thereby. If there is due care and diligence in choosing competent servants to receive and transmit the necessary orders, the negligence by them in the performance of it is a risk of the employment that the co-employé takes when he enters the service. The duty of

backward, its signals must be displayed upon the bumpers. It was made the duty of the yardmaster to see that the cars were brought together with as slight a jar as possible, and coupled with coupling sticks. The engineers were required to use the utmost care in pushing cars into turnouts, so as to avoid injuring them or other property. Brakemen were required to exercise great care in coupling cars; and as, for various causes, it is dangerous to expose the hands, arms, or person between the same, they were required, before coupling, to examine the situation, and act prudently. The deceased made the coupling alone, though he was not required to do so, but could have waited for the engine, and could have had the assistance of some of his co-workers to help him. He could have used a lamp, but did not, though he had a full supply. There were coupling sticks in the caboose for use, which, when used, had the effect of lengthening the arms. Considering the precautions and aids which the deceased might have used to avoid the accident, and did not, it would be quite as easy to show that the accident resulted from an omission to use these precautions, on his part, as that it was caused by the defendant's neglect to make a rule for the display, upon cars that were being coupled, of a red light or red flag. There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by a rule. The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads, to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common

the master is performed when he has provided beforehand rules explicit and efficient, and has chosen agents with due care for their possession of skill and competency, and has used the best means of communicating such rules to his employés, according to prescribed general rules and regula-

experience and knowledge, the court is not warranted in submitting such a question to the jury."

It is difficult to understand upon what principle it is ever held that the jury are competent to determine what particular act the defendant should have done in regard to conducting his business in a reasonably safe manner. The question to be submitted to them is whether, in the absence of precautions, the act was or was not negligent. This is the result of the reasoning of those cases where negligence is sought to be established by the absence of gates or flagmen at crossings. *McGrath v. Railway Co.*, 63 N. Y. 522; *Houghkirk v. Canal Co.*, 92 N. Y. 227; *Philadelphia & R. R. Co. v. Killips*, 88 Pa. St. 412; *Heddles v. Railway Co.*, 74 Wis. 256, 42 N. W. 237.

It may be, in consideration of the fact that the contract of service implies a duty in proper cases on the part of an employer to make and promulgate rules, that the failure of the company to make any rules may be shown as a circumstance tending to show a violation of the contract or its duty in this respect; but it would not warrant a court in submitting, or a jury in determining, what particular act the company should do, or what particular rule it should thus make and promulgate. The reasoning of the courts in the cases cited ought to be conclusive upon the question.

A servant was injured while removing ore from under a car, and, while so engaged under the car, a car above, coming down the incline, started from some cause unknown, pushed against the car under which he was at work, causing the injury. The defendant, his employer, operated a series of ore kilns, in front of which was a railway track, upon which these cars were situate, used for the purpose of carrying away the ore. It was held there was nothing in the nature of the work rendering it necessary for the defendant to make rules for its employés to prevent such an accident. *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 234.

It is error to submit to the jury the question whether or not it was



tions derived from the best evidence in such business.<sup>8</sup> This doctrine is not approved by some other courts.<sup>9</sup>

The theory of the case of *Slater v. Jewett* is that the duty of a railroad company to adopt rules requiring signal lights to be placed on empty cars standing on a siding, in the absence of evidence that such a rule would have been practicable, that other companies had adopted the same, or that the cars upon such sidings were frequently shifted. *Shepherd v. Northern Cent. R. Co.*, 63 Hun, 634, 18 N. Y. Supp. 665.

When there was no evidence that the defendant railroad company had promulgated any rule relating to the inspection of cars after loading, except that the station agent said he understood it to be his duty to inspect such cars, and he had not inspected the car in question, or given any instructions to men under him in that regard, it was a proper question for the jury to determine whether the defendant had made proper provision for the inspection of such loaded cars. *Byrnes v. New York, L. E. & W. R. Co.*, 71 Hun, 209, 24 N. Y. Supp. 517.

When it is not shown that any rule for the protection of defendant's employes while at work on cars standing on their tracks could have protected them, the absence of rules for such protection is immaterial. *Texas & P. Ry. Co. v. Cumpston* (Tex. Civ. App.) 23 S. W. 47.

<sup>8</sup> *Slater v. Jewett*, 85 N. Y. 61.

Where a book of rules was kept in the conductor's desk in one of the cars, and plaintiff had seen it a great many times, and knew it was in use; and the trainmen had access to it, and an opportunity to see and read it; and he had read the book, and knew that the duties of brakemen were printed in it,—it was held that plaintiff was negligent in failing to obey the rules, though the railroad company had not furnished him with a book of rules, nor required him to read it. *La Croy v. New York, L. E. & W. R. Co.*, 132 N. Y. 570, 30 N. E. 391.

Knowledge cannot be presumed of a standing order in regard to the management of trains, not one of the printed rules, from the fact that the order was posted some time before; it not being shown

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<sup>9</sup> *Covey v. Hannibal & St. J. R. Co.*, 27 Mo. App. 170; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188.

master is to make and promulgate rules, and give them due publication or publicity, and is not, in terms, to personally place in the hands of each employé a copy of such rules;

whether it had been torn down, or was still up during the servant's employment. *Wooden v. Western New York & P. R. Co.* (Super. Buff.) 18 N. Y. Supp. 768.

Where the evidence is in direct conflict as to whether a brakeman was aware of a certain regulation prescribed by the company, it is a question for the jury. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 South. 249.

Where a rule prohibiting employés from going between moving cars has been in existence for a long period of time, and plaintiff for several years was in defendant's employ, and the rule was generally circulated among defendant's servants, and was posted in conspicuous places about depots and other places, the rule is admissible in evidence, though it is not shown that plaintiff had actual knowledge of such rule. *Alcorn v. Chicago & A. R. Co.* (Mo. Sup.) 16 S. W. 229.

The rules of a railway company for the government of its employés are not obligatory, as such, upon those who are not aware of them, and to whom they have not been promulgated. *Central Railroad & Banking Co. v. Ryles*, 84 Ga. 420, 11 S. E. 499; *Covey v. Hannibal & St. J. R. Co.*, 27 Mo. App. 170; *La Croy v. New York, L. E. & W. R. Co.*, 57 Hun, 67, 10 N. Y. Supp. 382; *Mackey v. Railroad Co.*, 8 Mackey, 282.

Where a rule book offered in evidence contained the rules in force when the employé was injured, the book is admissible without first proving the employé had knowledge of the rules it contained. *Parker v. Georgia Pac. Ry. Co.*, 83 Ga. 539, 10 S. E. 233.

A servant is not bound by an unpublished rule which has not been properly published or brought to his attention, and which has been habitually neglected. *Fay v. Railway Co.*, 30 Minn. 231, 15 N. W. 241.

Rules are not admissible as evidence against a servant who had no knowledge of them. *Atchison, etc., R. Co. v. Plunkett*, 25 Kan. 188.

A plaintiff was an engineer on defendant's road. On the morning in question, a short time prior to starting with his train, he re-

that when competent servants are selected to deliver them, or through whom they are to be delivered and made known to employes, that is a promulgation of such rules; that the servants thus intrusted with the detail of delivery are fellow

ceived a new time-table, which he then studied with his conductor. By that time-table the time was changed for meeting another train at a station named, and also in relation to a train running Sunday night. The contention was that, in the limited time the engineer had to study his time-table, he failed to discover that the change of time would bring a train, with which he collided on Sunday night, at the place of collision, and that the company was negligent in not furnishing him the new time-table a longer time prior to his starting with the train. The action was not brought for injuries received by such engineer, but to recover a balance of wages; the company having discharged him by reason of his act, which they claimed was negligence. The court says: "The time-table is in evidence, and to a layman it might appear difficult to understand it thoroughly after close study of it for two hours or a day. This might not appear so to an expert. But how the fact is the court does not know. It is impossible for us to say that the plaintiff had sufficient time after he received the time-table to master its contents, and learn accurately the movement of all trains. If the defendant company did not furnish the time-table to plaintiff long enough before he was required to start his train to enable him to master its contents, then he should not be held negligent because he did not understand it fully, if he made a reasonable effort to understand it. This consideration alone is sufficient to send the question of his negligence to the jury."

I hardly think the reasoning of the learned court meets with general approval. If it was impossible for the court to determine the question, it certainly was just as impossible for the jury. But, further than this, the court should have known that the claim on the part of the engineer that he required more time to study his time-table was but the sheerest pretext. Every one knows—if not, a moment's examination would satisfy him—that the engineer could determine meeting points with his train at a glance. Still further, the engineer was not required to start until he fully understood his time-card. If he did so, and especially without complaint, knowing

servants. It is true that much of the opinion is devoted to the special facts of that case, where a special order or rule was involved; but no good reason can be seen why the logic as applied to the facts of that case is not equally applicable to general rules, so far as they relate to the oper-

that changes had been made, was not such an act the most gross negligence? The company had the right to assume he would not attempt to perform such a perilous duty without fully acquainting himself with its probable, if not possible, risks. The court evidently did not feel secure in its position, as it seeks to excuse it, in a measure at least, by reference to the circumstance that the engineer had been continuously on duty for a great many hours, and his neglect to perform his duty might be excused on that ground. The company, under the rules of law so vigorously applied to them, had no alternative but to discharge the engineer. If they retained him in their service after so patent an act of negligence, and thereafter a similar act or any negligent act of his should cause injury to employes, then the company would be met with the proof of this specific act of negligence as a notice to them that the engineer was incompetent; and, if the question were left to the same or a similar jury, it is fair to presume that upon such questions alone they would promptly find that the company was negligent in retaining an incompetent servant in their employ after notice of his incompetency.

It is not always that the result to the parties of a particular decision is burdensome, but the principles of law pronounced or applied may, and often do, affect seriously great and important rights and interests. To-day almost every exception made by a court of last resort becomes a rule,—an established precedent; and for this reason, if none other, courts of last resort should be extremely cautious in making exceptions where general rules apply.

Where an employé had been employed many months as a section hand, and, while performing service as a track walker, mounted a passing engine, contrary to rules. He was chargeable with notice of such rule, from the fact that copies of rules containing the one in question were circulated among the section foremen. That those in charge of the engine did not object could make no difference. *Shenandoah Val. R. Co. v. Lucado's Adm'r*, 86 Va. 390, 10 S. E. 423.

ation of trains, at least, or to those so employed as to be liable to be injured by the manner in which trains are operated. In fact, there is more reason for its application to general than special rules. Every employé engaging for service must be presumed to know that railroad companies make and promulgate rules, and that it is his duty to acquaint himself with them. Due regard for his own safety should prompt him to do this, and it is quite doubtful whether a man could be said to be in the exercise of due care who failed to do so. It is a matter of common knowledge, and of which courts may take judicial notice.<sup>10</sup>

It was held in *Pilkinton v. Railway Co.*<sup>11</sup> that, in the absence of any proof upon the subject, it would be presumed that the employé had such knowledge; and in *Alexander v. Railroad Co.*<sup>12</sup> it was held to be the duty of a conductor to acquaint himself with the rules, even when it appeared he was not furnished with a copy, and was ignorant of their existence.

The question is a close one, and perhaps as just and satisfactory a rule as any would be to trace the duty of communication to a fellow servant, and for the negligent act of those who represent the master the master should be liable, and for the negligence of those who are in any other respects fellow servants the master should be relieved, and the act or omission chargeable to them as

<sup>10</sup> *Agawam Bank v. Strever*, 18 N. Y. 502; *Slater v. Jewett*, 85 N. Y. 68.

<sup>11</sup> 70 Tex. 226, 7 S. W. 805.

<sup>12</sup> 83 Ky. 598.

Where a rule is conspicuously posted in the cars upon a train upon which an employé frequently rides, he must be presumed to have knowledge of such rule. *Pennsylvania Ry. Co. v. Langdon*, 92 Pa. St. 21.

such. Most orders relate to operation of trains, though not all. After the person whose duty, on the part of the master, it is to promulgate rules, or communicate them to those engaged in the service, has performed his duty, by communicating them to a servant who in turn is to observe them, or communicate them to another, then the omission or neglect of such other is the omission or neglect of a fellow servant, to the same extent as his disobedience of an order or rule, after receipt or knowledge, causing injury to another, would be such an act.

As to those orders or rules relating to the appliances and ways, it being the absolute duty of the master to see that such appliances and ways are reasonably safe, the master should be held to a strict liability to see that they were actually received and known. In fact, it is difficult to perceive how the fact that such an order was or was not known to the employé could affect the case one way or the other, as the duty is absolute on the part of the master to furnish and maintain them reasonably safe. There are some states where this doctrine does not prevail to this extent, and its application there might not be improper or unjust. The decision in *Chicago, B. & Q. R. Co. v. McLallen*<sup>13</sup> was placed upon this ground, and not upon the general duty to give actual notice to each employé.

An employé cannot dispute the reasonableness of a rule or regulation. If a railroad company cannot have strict compliance with its orders from its servants, subordination and discipline would be at an end. If the employé is justified in disputing the reasonableness or propriety of a regulation, it must follow that he is justified in disobeying that regulation; and upon such principles railroads would be run with the greatest difficulty, and most im-

<sup>13</sup> 84 Ill. 109.

minent danger to the traveling public. If to obey an order is plainly to imperil life or limb, the servant may refuse.<sup>14</sup>

There is an implied reservation accompanying every order,—that it is not to be executed when it cannot be done without reasonable regard to human life.<sup>15</sup> But the bare fact that a position to which an employé is ordered for the discharge of his duty is a dangerous one will not justify his disobedience, since he was employed for that duty, and its discharge may be necessary to save the lives of others, and a failure to do his duty might be negligence on his part, rendering the employer liable to others injured thereby. To assume a position of danger is not necessarily negligence, but is often a clear duty.<sup>16</sup> If the servant knows the required act to be unlawful, he is justified in refusing obedience, though directly commanded to perform it.<sup>17</sup>

There are some cases which go to the extent of holding that where servants, notwithstanding a rule, are habitually violating it, and such common disregard of the rule is known to the master, the mere fact of being engaged in violation thereof at the time of the accident and consequent injury will not bar a recovery against the master for his

<sup>14</sup> *Hawley v. Chicago, B. & Q. Ry. Co.*, 71 Iowa, 717, 29 N. W. 793; *Stephens v. Railroad Co.*, 86 Mo. 221.

That plaintiff could not see a danger signal on account of fog is no excuse, in view of a rule, with which he was familiar, providing that a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal. *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

<sup>15</sup> *Hawley v. Railway Co.*, 71 Iowa, 717, 29 N. W. 793.

<sup>16</sup> *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 378.

<sup>17</sup> *Southern v. How*, Cro. Jac. 471; *Grylls v. Davies*, 2 Barn. & Adol. 516.

negligence in acquiescing in such violation thereof.<sup>18</sup> The cases holding to such view are numerous, but it cannot be

<sup>18</sup> *Fay v. Railroad Co.*, 30 Minn. 234, 15 N. W. 241; *Sprong v. Railway Co.*, 58 N. Y. 56; *Alexander v. Railroad Co.*, 83 Ky. 590; *Hayes v. Bush Manuf'g Co.*, 41 Hun, 407.

Where the rule prohibited engineers from permitting firemen to operate their engines except when they are themselves present upon them, but at the time of the accident, and for years before, there was an established usage on the part of defendant's engineers, known and acquiesced in by the superior officers, to allow firemen to make short moves without the presence of the engineer upon the engine, but near enough to give directions, such violation may be excused. *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62, 11 S. W. 308.

Where a brakeman, under the directions of the conductor, and in the presence of the division superintendent, and with his knowledge, opens and adjusts a switch for a long time in a manner different from that prescribed by established rules, such rules are deemed changed or modified as to such brakeman. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 661, 21 Pac. 770.

Where a rule prohibited conductors and engineers from making flying switches, a brakeman who was killed while working under the direction of an engineer, in the usual and customary method of making such switching, was not guilty of contributory negligence, though he knew of such rule. *Union Pac. Ry. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774.

Parol proof that defendant's rules required the engine bell to be rung is admissible; it not appearing that there was a better kind of proof of such regulation. Independently of prescribed rules, the law would imply a duty to give signal of the movement of an engine as to plaintiff. *Sobleski v. St. Paul & D. R. Co.*, 41 Minn. 169, 42 N. W. 863.

Where an engineer occasionally runs at a greater speed than 15 miles per hour, notwithstanding a rule limiting speed of freight trains to 15 miles per hour, such rule has no application where the speed does not exceed that rate, actual running time, and where it also appears that it is customary to run at a greater speed down grade, to make up lost time, and that the road for 7½ miles before



said they rest upon any well-defined principle of law; the general proposition controlling in such cases being

the place of accident was up and down grade. *Sutherland v. Troy & B. R. Co.*, 54 Hun, 639, 8 N. Y. Supp. 83.

Where a rule requires cars to be coupled by a stick, it has no application where such coupling could not otherwise have been performed than by going between them. *Memphis, etc., Ry. Co. v. Graham*, 94 Ala. 545, 10 South. 283.

If the rule had been uniformly disregarded by employes, which fact was known to the division superintendent, without objection on his part, it will be deemed waived. *Northern Pac. Ry. Co. v. Nickels*, 4 U. S. App. 369, 1 C. C. A. 625, and 50 Fed. 718.

In absence of printed rules, where yardmaster directed employe not to go between cars, yet subsequently the conductor so directed, such direction was a waiver of the rule. *Hannah v. Railway Co.*, 154 Mass. 529, 28 N. E. 682.

The existence of a rule requiring cars to be coupled with a stick applies only where the company has furnished cars that may be so coupled with reasonable safety. *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 8 South. 776.

Where it is shown defendant did not under all circumstances insist upon the observance of the rule, the violation thereof may be excused. *Id.*

Where a rule had been systematically violated for at least a year, the company cannot insist that it ought to have been observed. It is the duty of the company not only to make rules, but to enforce them. *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. 1042.

A rule prohibiting going between mining cars to couple or uncouple them does not apply to employers standing on a running board put on a tender of an engine for switchmen to ride on. *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276.

When the injury would have been received in coupling cars though a stick had been used, as required by the rules, the company cannot insist upon the rule as a defense. *Reed v. Railway Co.*, 72 Iowa, 166, 33 N. W. 451.

Where employe acts upon verbal order of train dispatcher, although rule required that specific orders should be in writing, such

that a servant cannot recover where his violation of the orders of the master contributed to the injury.<sup>19</sup>

requirement is waived. *Smith v. Railway Co.*, 92 Mo. 359, 4 S. W. 129.

<sup>19</sup> *Wolsey v. Railroad Co.*, 33 Ohio St. 227; *Gardner v. Railway Co.*, 58 Mich. 584, 26 N. W. 301; *Gulf, W. T. & P. Ry. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83.

In the following cases the violation of rules was held not excusable:

Where an employé, a minor, while disobeying the orders of his foreman, assumes unusual dangers, and is injured before his action, in the exercise of proper care, could be discovered and stopped. *Robertson v. Cornelson*, 34 Fed. 716.

Where an employé attempts to board a moving train, thereby disobeying a known and reasonable rule. *Gulf, W. T. & P. Ry. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83.

Where employé is acting in disobedience of an order or rule prohibiting flying switches. *Pilkinton v. Gulf, C. & S. F. Ry. Co.*, 70 Tex. 226, 7 S. W. 805.

Where the undisputed evidence shows an employé to have been in the cab of an engine, contrary to instructions given him. It was error to leave that question to the jury, even under proper instructions. *Conners v. Burlington, C. R. & N. Ry. Co.*, 74 Iowa, 383, 37 N. W. 966.

Where a conductor was knocked off the top of a box car by contact with a scaffold suspended over a bridge, being prevented by obstructions along the track from going to the caboose, as the train started. It was a custom sometimes to be on box cars to brake and signal. The scaffold could have been raised three or four feet higher, and the attention of the foreman had been called to that subject, who, however, claimed it was high enough. A rule was in force prohibiting all persons from standing on top of box cars while passing through bridges, and from boarding moving trains. *San Antonio & A. P. Ry. Co. v. Wallace*, 76 Tex. 636, 13 S. W. 565.

Where a baggageman, while riding on the engine, contrary to a rule, requiring them not to leave their car, and then only for as short a time as possible, and which forbade their riding on the engine. *Louisville & N. R. Co. v. Wilson*, 88 Tenn. 316, 12 S. W. 720.

Where an employé, while traveling on a wrecking train to assist

The doctrine of waiver is sought to be applied; yet this is but another instance where a very just and equitable principle is misapplied. There is great danger, not only in cases of negligence, but those involving other questions,

in removing a wreck, rode on the engine, contrary to rule forbidding it. *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202.

Where a car repairer fails to place a blue flag on the car under which he is working, as required by a rule. *Quick v. Indianapolis & St. L. Ry. Co.*, 130 Ill. 334, 22 N. E. 709.

Where defendant had in force a rule that brakemen, in coupling cars, must know that their signals are understood and obeyed before they place themselves in a position of danger, relying on such obedience. When they act without such knowledge, they assume all risk of danger arising from disobedience of the signal. *Deeds v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa, 154, 37 N. W. 124.

Where the company had given employé a printed rule that each employé before exposing himself to danger must examine all machinery, cars, etc., satisfying himself they are safe, and that he should take sufficient time for such examination, and should refuse to obey orders exposing himself to danger, and such employé attempted to make a coupling, when he knew the apparatus was defective. *Karrer v. Detroit, G. H. & M. Ry. Co.*, 76 Mich. 400, 43 N. W. 370.

Where a rule required a danger signal, applicable alike to the employé and his superior, when such employé was at work under a car, the neglect of the superior to obey the rule did not excuse the subordinate. *Central Railroad & Banking Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827.

Failure to use coupling sticks when provided. *New Jersey & N. Y. R. Co. v. Young*, 1 U. S. App. 96, 1 C. C. A. 428, and 49 Fed. 723; *Norfolk & W. R. Co. v. Briggs* (Va.) 14 S. E. 753; *Russell v. Railway Co.*, 47 Fed. 204; *Rome & C. Const. Co. v. Dempsey*, 86 Ga. 409, 12 S. E. 882; *Darracott v. Railroad Co.*, 83 Va. 288, 2 S. E. 511.

Switchman violating positive rule in regard to jumping on moving engine. *Francis v. Railway Co.*, 110 Mo. 387, 19 S. W. 935; *Darracott v. Railroad Co.*, 83 Va. 288, 2 S. E. 511.

Employé, in violation of rule, who uses for his own convenience

of carrying this doctrine far beyond its legitimate application. It seems in many cases to have been a convenient pretext upon which to excuse culpable negligence, a fair illustration of which is found in the judgment of the lower court in *Berrigan v. New York, L. E. & W. R. Co.*, supra.

an elevator, and falls down the shaft. *Guenther v. Lockhart*, 61 Hun, 624, 16 N. Y. Supp. 717.

Where the defendant posted notices of warning or danger near where track was being repaired, duty of engineer to see and read it. *Williams v. Railroad Co.* (Va.) 15 S. E. 522.

Brakeman undertaking to make coupling on moving train, though ordered so to do by the engineer. *East Tennessee, V. & G. Ry. Co. v. Smith*, 89 Tenn. 114, 14 S. W. 1077.

The mere fact that other employes disregarded a rule regarding coupling cars with a stick will not justify the plaintiff in so doing, or excuse him in making a coupling by hand, unless defendant had acquiesced in the violation of the rule in such a way as practically to abrogate it. *Sloan v. Georgia Pac. Ry. Co.*, 86 Ga. 15, 12 S. E. 179.

Where uncoupling cars is attempted while cars are in motion. *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924.

Though customary for rear brakemen to ride inside rear car, if rules provide for his being at brakes while cars are in motion. *Gordy v. New York, P. & N. R. Co.*, 75 Md. 297, 23 Atl. 607. Contra, *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 9 South. 252.

Where employe knowingly disobeys a rule established for his safety, unless he acted under influence of fear produced by sudden danger. *Gulf, W. T. & P. Ry. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83; *Lyon v. Railway Co.*, 31 Mich. 429; *Shanny v. Androscoggin Mills*, 66 Me. 429; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Georgia R. Co. v. Rhodes*, 56 Ga. 645.

Where employe, though a minor, voluntarily assists in making a flying switch. *Youll v. Railway Co.*, 66 Iowa, 346, 23 N. W. 736.

A conductor cannot, in violation of a known rule of the company intended for the safety of passengers, license a passenger (an employe riding upon the train considered as such) to occupy a place of danger so as to make the company responsible for the injury. *Pennsylvania Ry. Co. v. Langdon*, 92 Pa. St. 21.

It is generally said that the master will be deemed to have waived a rule promulgated for the servant's own safety, where he knows it is generally or habitually violated. Suppose it may be so considered. The effect, reasonably, could only extend to a waiver of any liability on the part of the servant to the master for injury to the person or property of the master. The servant is informed, by the existence of the rule, that the master has made adequate provision for his safety. The servant is presumed to know—for such is the law—that, where both are on an equal footing, the master is under no greater obligation to care for the safety of the servant than the servant is to look out for his own safety. They have equal knowledge. The servant has at his option two methods of doing his work,—the one perilous, the other reasonably safe, considering the hazards of the employment. How can it be said, if he adopt the more perilous, and he is thereby injured, that it is aught else than his own fault? These remarks have special application to the custom among employes of jumping on and off moving trains, and the dangerous method they voluntarily assume in coupling and uncoupling cars.

## CHAPTER VI.

## MASTER'S DUTY (Continued)—INSPECTION.

**Not required to specially test appliances purchased from reputable manufacturers or dealers, p. 94.**

**Such reasonable care in selecting and ordering as every prudent man would exercise, is all that can be required, p. 94.**

**The supreme court of Michigan applied a more stringent rule, p. 95.**

**The Michigan rule considered extreme, and not generally accepted, p. 96.**

**The subject ably discussed in an opinion by one of the judges of the court of appeals of New York, p. 98.**

**The general duty of the master as to appliances in use is to apply all reasonable and usual tests, p. 100.**

**He must inspect and look after the condition of his appliances, and see that they are kept in repair, p. 101.**

**His vigilance in this respect must be proportioned to the danger he may know or anticipate, p. 101.**

**His duty in respect to foreign cars, pp. 103, 105, 107.**

**Liability of the company from which the car was received, p. 107.**

**The master may be charged with knowledge of a defect, simply from a lack of or improper inspection, p. 107.**

**This result follows when reasonable inspection would have discovered the defect, p. 107.**

**If the defect has existed for a length of time, knowledge may be presumed from this fact alone, p. 108.**

**Duty as to premises and ways the same as duty in regard to appliances, p. 108.**

We have seen that the master's duty is to exercise ordinary care in furnishing and maintaining his machinery, appliances, and ways or premises in a reasonably safe condition. The general principles of ordinary care have been discussed and stated. It remains to discuss and determine further what particular or specific duties rest upon the master to meet the requirements of his duty in this respect.

Many appliances, including engines, cars, rails, and machinery, are purchased by the employer, who, as a rule, has not equal means and facilities for testing or determining their strength, or ascertaining their defects, if any, with those who manufacture such appliances or specially deal in them. They are purchased from responsible dealers; oftentimes from the manufacturers themselves, who make a specialty of such appliances. What examination or inspection in such cases, if any, devolves upon the master? Must he, or those who represent him in the purchase, critically inspect all parts of such appliances, and each rail or article, so purchased, or may he rely upon the reputation of the makers or dealers, and assume that they have furnished a reasonably fit, suitable, and safe machine, article, or appliance, where no defects are obvious upon their mere inspection?

It is stated by Judge Cooley in his work on Torts<sup>1</sup> that "the law does not require the master to guaranty the prudence, skill, or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the

<sup>1</sup> Page 557.

materials they make use of. If he employs such reasonable care and prudence in selecting or ordering what he requires in his business, such as every prudent man is expected to employ, providing himself with the conveniences of his occupation, this is all that can be required of him." This would seem to be exactly true. The duty is one of ordinary care, and it must be fully met when ordinary care has been exercised. It follows, therefore, that in reference to any particular appliance, piece of machinery, or other apparatus purchased new by the employer for use, if prudent men engaged in the same business deem it essential to adopt a method of inspection or test, before use, of such appliances or articles, and such inspection or test is ordinarily made by persons possessing such prudence and caution, then that method, or one equally efficient, is a duty imposed upon a master who purchases.

The supreme court of Michigan, however, lay down a strict rule in regard to inspection in the first instance,—that, if any defect exists which a careful test or inspection would have discovered, the master must be held to have knowledge of it. The court say, in reference to the appliance there in question,—a chain: "They are not absolved from the duty of testing or inspection because they have bought in the open market, of reputable dealers, or have employed competent workmen to construct them. It not only can, but its duty requires that it shall, before it is placed on a car, cause every link of every chain used by its employes in places or under circumstances involving danger, in case the chain should break, to be carefully tested and inspected by some one competent to judge of its fitness for the utmost strain that is likely to come upon it."<sup>2</sup>

<sup>2</sup> Morton v. Railway Co., 81 Mich. 433, 46 N. W. 111.

In Illinois C. R. Co. v. Phillips, 49 Ill. 237, this was said, with reference to the duties of railroad companies to passengers: "They



This perhaps extreme view is not in harmony with the decisions elsewhere, or with former decisions of the same

must provide and use properly constructed machinery, well constructed by competent and skillful workmen, when manufactured by the company, and from good materials. They must employ competent, skillful, prudent, and sober men to use such machinery, and in doing so they must be careful and vigilant in its examination, to see that it is in proper repair and in a safe condition. On the other hand, they cannot be held to answer for latent defects in materials employed in the construction of their machinery, which the usual and well-recognized tests of science and art afford for the purpose, but fail to detect. Nor are they liable for accidents occurring, by which injury ensues, when skill and experience are not able to foresee and avoid them, nor when they have exercised judgment and skill in selecting the material, manufacturing their machinery, and in its use upon their roads, or in selecting machinery manufactured by others. [Citing *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Ingalls v. Bills*, 9 Metc. (Mass.) 1; *Painter v. Mayor, etc.*, 46 Pa. St. 213; *Boswell v. Laird*, 8 Cal. 469.] When they have, so far as the employment of reasonable skill and experience enables them, employed experienced, skillful, and prudent servants in the use of their machinery; have selected good and safe machinery, so far as known and well-recognized tests can determine, constructed of proper material, free from defects, so far as like tests will disclose,—neither reason nor justice requires that they should be held liable for injuries that may result from using their franchises."

The case of *Richardson v. Great Eastern Ry. Co.*, 1 C. P. Div. 342, is much in point. The duty of the company to passengers was involved. The injury was caused by a flaw in an axle, which might have been discovered upon minute inspection, but which was not in fact discovered by such an examination as was customary and reasonably practicable. It was held that no negligence could be imputed for not making a more minute examination than was made. The court also stated that "it was not within the province of a jury to lay down rules, after their own opinion, which imposed duties beyond the usual practice of prudent railways."

In *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 150, the court say: "It may be considered as now settled that if a person employs others, not as servants, but as mechanics or contractors in an independent

court. In *Grand Rapids & I. Ry. Co. v. Huntley*<sup>3</sup> the court say, in speaking of the duties of railroad companies: "If they exercise their functions in the same way with prudent

business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries to others from their negligence or want of skill. If I employ a well-known and reputable machinist to construct a steam engine, and it blows up from bad materials and unskillful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and respondeat superior is the rule." *Painter v. Mayor, etc.*, 46 Pa. St. 213; *Godley v. Hagerty*, 20 Pa. St. 387; *Carson v. Godley*, 26 Pa. St. 111; *Boswell v. Laird*, 8 Cal. 469; *Ingalls v. Bills*, 9 Metc. (Mass.) 1.

In *Boswell v. Laird*, 8 Cal. 469, it is said: "The right of selection is the basis of responsibility of a master or principal for the acts of his agent. No one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows."

In the recent case of *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, on page 271, 149 U. S., and page 837, 13 Sup. Ct., the court say: "With regard to the defect in the iron casting which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of machinery, whether simple or complicated, to tear it to pieces, to see if there be some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that, in the manufacture, proper care was taken, and that proper tests were made of the different parts of the machinery, and that, as delivered to him, it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty, when placing the machine in actual use, to subject it to ordinary tests for determining its strength and efficiency."

<sup>3</sup> 38 Mich. 546.

railway companies generally, and furnish their road and run it in the customary manner, which is generally found and believed to be safe and prudent, they do all that is incumbent upon them,"—and cite, as sustaining this proposition, the cases given in footnote.<sup>4</sup> They further state: "This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions, lack of skill or attention, of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons. There is no principle in law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will, in general, make their own cars and engines; and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable; and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent upon him, and that the articles purchased of him which seem right are so in fact. Any other rule would make them liable for what is not negligence, and put them practicably on the footing of insurers."

In the case of *De Graff v. Railway Co.*,<sup>5</sup> where the article

<sup>4</sup> *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Grand Rapids & I. R. Co. v. Judson*, 34 Mich. 506; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

<sup>5</sup> 76 N. Y. 125.

under consideration was the same,—a brake chain,—it was distinctly held that the master was under no obligation to test its strength before putting it in use. Later, in the same state, the court with much force and reason lay down what seems to be the correct rule.<sup>6</sup> It is that “a master who puts a tool or implement into his servant’s hands may procure it in several ways. He may buy it ready made of a dealer, procure it to be manufactured, or purchase the materials and manufacture it himself. Liability for an injury resulting from a defect in the materials of a tool will be determined in each case by the same rule. If a hook like the one in the present case had been procured ready made in the open market, or manufactured at a foundry, the defendant would necessarily have been compelled to rely upon the dealer and manufacturer for the quality of the materials used. A completed hook ready for use could neither be cut into with a chisel or bent over an anvil without impairing its strength, or perhaps destroying it altogether. To apply such a test, therefore, to tools procured in that way, is impracticable; and such articles are not usually tested before they are put in use. The modern industrial system rests upon confidence in others. A railroad corporation cannot well apply such tests to the materials of which its cars and engines are made, or to the rails which form its tracks. Reasonable inspection is necessary, and required. But when articles are manufactured by a process approved by use and experience, and apparently properly finished and stamped, it is not usual for them to be tested again in quality; and such examinations are not generally required by law. If materials of the best quality are purchased, and tools constructed from them by competent and skillful workmen, and if there is nothing

<sup>6</sup> *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 278, 30 N. E. 750.

in the appearance of the material to indicate inefficiency, men in the ordinary affairs of life use them, and place them in the hands of their servants; and there were no circumstances surrounding the manufacture of the hook in question to induce a prudent man to depart from the usual course, or to adopt extraordinary care and precaution. All the best iron and steel is made in a few establishments. The evidence shows that all practicable tests are used during the process of manufacture, and the completed product represents the best article that can be produced. It passes into the hands of the dealer, and thus reaches the consumer. If the best refined iron is required, the purchaser may assume that the tests necessary to produce that article have been properly made, and the work properly done. He must see that the work he undertakes to do is properly performed; but if the tools break from an internal defect, not apparent from an external examination of the iron or in the process of making the tool, the master is no more responsible than he would be if he had purchased it ready made in the market, or if it had broken from an external apparent defect produced by use, of which he was not chargeable with knowledge."

The supreme court of Wisconsin, in *Smith v. Railway Co.*,<sup>7</sup> repeat what has been said,—that it is the duty of the company to adopt or apply all reasonable and usual tests to discover defects, but that it is not required to adopt such tests as are impracticable or unreasonable. The defect there was a brake rod. The evidence was to the effect that the usual tests were applied. The car was new, the inspectors were presumably competent, and it was stated by the court that it would be impracticable to apply tests to every brake rod in use, and, even if compatible with

<sup>7</sup> 42 Wis. 520.

the nature of the business, would be of doubtful utility; that, in order to justify a verdict in favor of the plaintiff, there should be testimony tending to show that the tests applied were inadequate, and not in accordance with the most approved methods.

Whatever the master's duty may be as to the method to be used in ascertaining whether his machinery and appliances furnished to his servant are reasonably suitable and safe, due care requires him, especially in the use of dangerous appliances, either himself or by some other selected for that purposes,—in either case, one competent and qualified,—to inspect and look after the condition of such appliances, and see that they are kept in repair.<sup>8</sup> This duty, when the character of the business is such as to require it, is imperative, and must be continuously and positively performed.<sup>9</sup>

The law charges the master with knowledge of that which he ought to have known, and he ought to know that which, by the exercise of due and reasonable care, he would have discovered.<sup>10</sup> His duty is to use the usual and ordinary tests. He is not required to resort to such tests and methods as are impracticable or unreasonable and oppressive, and which are only required to insure absolute safety.<sup>11</sup> But it is evident that the character of the machinery and appliance, as well as their use, must enter largely into the determination of the question of what tests and inspection his duty requires him to make. More certain and vigorous methods, more constant and vigilant care, is required, in

<sup>8</sup> *Northern Pac. R. Co. v. Herbert*, 116 U. S. 652, 6 Sup. Ct. 590.

<sup>9</sup> *Brann v. Chicago, etc., Ry. Co.*, 53 Iowa, 595, 6 N. W. 5; *Bessex v. Railway Co.*, 45 Wis. 477.

<sup>10</sup> *Wedgewood v. Railway Co.*, 41 Wis. 478, 44 Wis. 44; *Bessex v. Railway Co.*, 45 Wis. 481.

<sup>11</sup> *De Graff v. Railway Co.*, 76 N. Y. 131; *Flood v. Western Union Tel. Co.*, 131 N. Y. 604, 30 N. E. 196.

inspecting and testing such appliances as, by constant use, are likely to become defective and out of repair, especially in dangerous employments, than machinery and appliances or structures and premises that are not obviously dangerous, and, from their nature and construction, not likely to become defective and out of repair. Experience in hazardous employments, such as the operation of railroads, mills, and factories, has developed to a great degree the ability to determine where defects in the appliances in use are, ordinarily, likely to be found, what parts are subjected most to wear, as well as what parts are liable to become weak from strain, weight, or other causes; and whenever danger ought to be apprehended by prudent men of the requisite skill and experience, a constant and vigilant inspection and oversight should be made to discover defects that thus may be anticipated. Of course, some parts require more frequent and more rigid inspection and watchfulness than others, and different tests in character must be applied to different parts. For instance, the wheels upon railroad cars require more frequent inspection and test than the framework, and also different in character. Striking the wheels with a hammer conveys the information of their soundness and safety; while an examination, however minute by observation, might not discover a defect if it existed. The failure of the master, therefore, to inspect, is not of itself proof of negligence, rendering him liable to his servant, unless it appears, from the nature of the business, the manner of use of the appliance, and the character of the appliance itself, that the master, in the exercise of ordinary care, should have seen the necessity of such precaution of inspection.<sup>12</sup>

<sup>12</sup> *Lafflin v. Buffalo & S. W. Ry. Co.*, 106 N. Y. 140, 12 N. E. 599; *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 234.

A question of some difficulty has been presented to the courts as to the nature of the master's duty in respect to foreign cars. The demands of commerce, creating an immense increase of traffic from distant points to commercial centers, has made it impracticable to transfer freight from cars in which originally loaded, upon its receipt by connecting lines; and it has become a practical necessity to receive such freight in bulk, and transport it to or towards its destination in the cars in which it was loaded or received. These cars oftentimes are of different patterns, makes, and styles of construction from those in use by the company who is called upon to haul them, and, in fact, dissimilar from other cars coming from the same or other roads. These cars must be forwarded without unnecessary delay. If in an ordinary condition, railroads under the law are compelled to receive and transport them. To hold railroad companies in respect to such cars to the same standard or measure of duty would be very unjust, and frequently would impair the efficiency of their service to the public; operating as a serious impediment to traffic and commerce. So it has been held that the master's liability to his servant in respect to injuries caused by defects and insufficiency of foreign cars does not rest upon his duty to furnish proper instrumentalities, but upon his duty to make proper inspection;<sup>13</sup> and that this duty was per-

<sup>13</sup> *Keith v. New Haven & N. R. Co.*, 140 Mass. 175, 3 N. E. 28; *Mackin v. Boston & A. Ry. Co.*, 135 Mass. 201; *Kelly v. Abbot*, 63 Wis. 310, 23 N. W. 890.

The case of *Kelly v. Abbot*, *supra*, presents reasons so conclusive and satisfactory that extracts from the opinion are given here. They say: "The liability of the railroad company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employes may work, but upon its knowledge, actual or presumed, that such coupling appliances will not properly fit and



formed by the employment of sufficient competent inspectors, acting under proper superintendence, rules, and instructions.<sup>14</sup>

connect with each other. It does not appear from the complaint that the company had not in their employ at the time suitable persons to make inspection of all foreign cars, and ascertain their fitness to go into its trains, and it is presumed that such persons were so employed, and that other employes of the company caused the foreign car in this case to be upon the side track, ready to be coupled to the caboose. If, therefore, there was any negligence on the part of any one in not ascertaining beforehand that their couplings would not meet, it must have been the negligence of the co-employees and fellow servants of the intestate, for which the company is not liable." The court further say: "The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference [in the height of couplings], and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to be in the use of proper care when he endangers his own life by not seeing, observing, or knowing of such difference in the elevation of the coupling irons. Did not the intestate have the same, if not superior, means of knowing this difference, as or to those of the company? If the negligence of the intestate and that of the company are equally balanced in this respect, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law."

"Keith v. New Haven & N. R. Co., 140 Mass. 175, 3 N. E. 28; Mackin v. Boston & A. Ry. Co., 135 Mass. 201; Kelly v. Abbot, 63 Wis. 310, 23 N. W. 890.

It is now quite generally held that the occasional or frequent use of foreign cars of different manner of construction, in the ordinary course of business, is one of the ordinary risks an employé assumes. He knows—he is bound to know—that cars from other roads are being constantly hauled over the road whose employé he is. He must know these cars may be differently constructed. Baldwin v. Railway Co., 50 Iowa, 680; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298; Indianapolis, B. & W. R. Co. v. Flanigan, 77 Ill. 365; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Hathaway v. Railway Co., 51 Mich. 253, 16 N. W. 634; Thomas v. Railway Co.,

A railroad company receiving a loaded car from another is not under the obligation to make critical tests as to its safety or condition, but may assume, without being charge-

109 Mo. 187, 18 S. W. 980; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Simms v. Railway Co.*, 26 S. C. 490, 2 S. E. 486; *Whitwam v. Railway Co.*, 58 Wis. 408, 17 N. W. 124; *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112; *Kelly v. Abbot*, 63 Wis. 309, 23 N. W. 890.

There are some courts who refuse to adopt this view, and persistently maintain that there is no distinction between the duties of the master in respect to foreign cars and those of its own. *Jones v. Railroad Co.*, 92 N. Y. 628; *Miller v. Railroad Co.*, 99 N. Y. 657; *Gottlieb v. Railway Co.*, 100 N. Y. 462, 3 N. E. 344; *Reynolds v. Railway Co.*, 64 Vt. 66, 24 Atl. 134; *Mason v. Railway Co.*, 111 N. C. 482, 16 S. E. 698.

The doctrine proceeds upon the ground of public policy,—that railroads are obliged to receive and haul over their lines loaded cars delivered by connecting lines, and it would be unjust to charge them with responsibility for the manner of their construction. They must use reasonable care and diligence to see that they are in proper repair, and kept in such condition while in their charge.

The Missouri court states the rule: "While it is not incumbent upon the receiving company, on receipt of the car, to make tests to discover hidden defects in the construction or in the materials used in the construction, still it is bound to inspect foreign cars, just as it would and is required to inspect its own after they have been in use. The duty devolves upon the company as much in the one case as in the other." *Guttridge v. Railway Co.*, 94 Mo. 468, 7 S. W. 476.

Since the federal supreme court has expressed its opinion upon the subject, which, to some extent at least, may present a federal question, there should be no difference in opinion among the state courts.

In *Mexican Cent. Ry. Co. v. Shean*, (Tex. Sup.) 18 S. W. 151, it was said that it was not the absolute duty of the master to inspect foreign cars, and have them properly loaded; that his duty to furnish safe appliances and machinery, including cars, does not extend so far.

In the recent case of *Thomas v. Railway Co.*, 109 Mo. 187, 18 S. W. 980, all the authorities are reviewed, and the conclusion reached

able with negligence, that all parts of such car which appear, upon examination, to be in good condition, are in such condition.<sup>15</sup> Nor is there anything that was said in the more recent case of *Cowan v. Chicago, M. & St. P. Ry. Co.*<sup>16</sup> in conflict with the doctrine stated. True, in the latter case the car in question was a foreign car; but it was being used by the company as one of its own; and the rule seems to be quite well settled, in such case, that the company owes the same duty as in case of its own cars. No point was made that it was a foreign car, and no rule of law insisted upon as being applicable thereto. The court merely held that from the evidence the jury were justified in determining that a proper inspection would have discovered the defect; that the defendant should have applied

that the manner of construction of foreign cars is a risk assumed as an ordinary risk incident to the service.

The Michigan court, in the recent case of *Dewey v. Railway Co.*, 97 Mich. 329, 52 N. W. 942, and 56 N. W. 756, repudiate the earlier decisions of that court upon this question, and hold, in express terms, that the duty of inspection is personal to the master; that it cannot be delegated to another, so as to relieve the master from responsibility in case of negligent performance, causing injury to an employé; and that the duty and responsibility is the same with reference to foreign and domestic cars. This case is authority, also, in that state, that it is a duty personal upon the master to see that cars are properly loaded, and ignores the distinction, recognized in former cases, between the duty of furnishing a safe place to work and safe appliances and the duty of seeing that the place or appliances are properly used and employed.

As to inspection generally, the Michigan court, in *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273, say: "The court will take notice, as part of the general knowledge of the business community, that the railroads of the country conduct inspections under a system which all persons so employed as to be interested are presumed to understand."

<sup>15</sup> *Ballou v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 262, 11 N. W. 559.

<sup>16</sup> 80 Wis. 284, 50 N. W. 180.

the ordinary and usual tests, which in the case of a brake rod was by striking it with a hammer. As to this car, under the circumstances, the company was not relieved from responsibility by the fact, if such it was, that it had employed competent inspectors, but was held to the duty of complete and proper inspection; that the neglect of or incomplete performance of duty on the part of inspectors selected, though competent, was chargeable to the master.

In *Gutridge v. Railway Co.*<sup>17</sup> the doctrine of the Wisconsin court was followed; it being stated that "it was not the duty of the company receiving such cars to test them to discover hidden defects, but when they use them in their own service must employ same tests as required of their own."

The supreme court of Minnesota, in a recent case, held that a railroad company which transferred to another a damaged car, the dangerous condition of which was such as to charge it with knowledge, was liable for injuries sustained, in consequence of such defect, by a brakeman of the company receiving such car.<sup>18</sup>

If this duty of inspection has been performed, and a defect afterwards is found to exist, but not discovered at the time, then it cannot be said that the master ought to have known of the existence of the defect, if he had no actual knowledge thereof. He certainly ought not to be held, and in the law cannot be, to the duty and responsibility of knowing that which, in the exercise of reasonable care, he was unable to discover. When actual knowledge is not shown, the jury, in case of injury caused by a defect, is almost always directed to ascertain whether he ought to have known, and, in determining this, to inquire whether, from the character of the defect, in connection with the facts and circumstances connected with the injury

<sup>17</sup> 94 Mo. 468, 7 S. W. 476.

<sup>18</sup> *Moon v. Northern Pac. Ry. Co.*, 46 Minn. 106, 48 N. W. 679.

and the defect, the master had not the duty imposed upon him of ascertaining it, which of course involves the questions whether inspection and test were necessary, and, if so, to what extent and character, and whether the required tests had been properly made.<sup>19</sup>

It is said that, if the defect had existed for a length of time, knowledge may be presumed from this fact alone.<sup>20</sup> But this follows only from a neglect of the master to exercise reasonable care to ascertain the defect, which involves the duty of test or observation which we call "inspection."

As to the master's premises and ways, there must be exercised by him the same duty of inspection, the same constant and vigilant supervision to discover defects that exist or may occur, that, we have seen, are imposed upon him as his duty with respect to the condition of his appliances and machinery.<sup>21</sup>

It was stated in *Bessex v. Railway Co.*<sup>22</sup> that "there is no distinction in principle between the duty to be exercised on the part of the master as to the safety of his machinery and the safety of his premises. That it was as much the duty of the railroad company to keep its railroad track in repair as it is to keep its machinery, engines, and cars in such repair; and neglect to keep them in such repair, or permitting the same to be obstructed in such manner as to increase unnecessarily the danger to its employes, is negligence, for which the company may be responsible in case of an injury happening to an employé by reason of such want of repair, or obstruction."

<sup>19</sup> *Hull v. Hull*, 78 Me. 114, 3 Atl. 38; *Nason v. West*, 78 Me. 253, 3 Atl. 911; *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918.

<sup>20</sup> *Deppe v. Railway Co.*, 36 Iowa, 52; *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918.

<sup>21</sup> *Van Dusen v. Letellier*, 78 Mich. 502, 44 N. W. 572; *Bessex v. Railway Co.*, 45 Wis. 482.

<sup>22</sup> 45 Wis. 482.

## CHAPTER VII.

### MASTER'S DUTY (Continued)—TO INFORM SERVANT OF DEFECTS AND RISKS.

**The master must inform servant of latent dangers known to him, where servant has no knowledge, and where knowledge cannot be imputed to him, p. 111.**

**Also, he must inform servant of obvious dangers which the servant is not presumed to appreciate or understand, p. 111.**

**The master or person placed in charge of a hazardous business, or department thereof, is presumed to be familiar with the dangers, latent and patent, ordinarily accompanying the business which he has in charge, p. 111.**

**Merely informing the servant generally that the service is dangerous is not sufficient, p. 112.**

**He should further inform him of the particular perils and dangers of the service, p. 112.**

**He is not required to inform servant of dangers that are the subject of common knowledge, or which could readily be seen by ordinary observation, p. 112.**

**Such risks are always assumed by the servant when he enters the service, p. 112.**

**A person of apparently sufficient age and physical ability and mental caliber, seeking employment in a particular service, is presumed to comprehend and avoid all dangers that may be discovered by ordinary care, p. 113.**

**He is held to an implied representation that he is competent to perform the duties of the position which he seeks, p. 113.**

**The rule is that an employe is presumed to know as much about the subject as may be observed by a person having a reasonable degree of experience in the employment upon which he enters, p. 113.**

**A master is charged with the presumption that children have the discretion and judgment usually possessed by children of their age, p. 114.**

**He must instruct such children concerning dangers which they are presumed not to appreciate and comprehend, p. 114.**

**The mere fact that an employe is a minor will not charge the master with responsibility as to obvious defects and dangers, unless the child was of an unsuitable age to be exposed to such dangers, p. 114.**

**A minor assumes the risks incident to the business so far as he is competent to comprehend and appreciate them, p. 114.**

**Whether the employment was with or without the consent of the parent does not affect the rule, p. 115.**

**In cases of doubt, the jury must determine whether the youth should have been acquainted with the risk, p. 117.**

**If the child knows, from any cause, the dangers, the master is not prejudiced by a failure to instruct, p. 118.**

**Though the child may not realize all the dangerous consequences, yet if he appreciates the danger**

of being hurt, and is injured by the means he anticipated, he cannot claim he did not realize the extent of the injury caused him, p. 121.

**The master must inform servant of dangers arising from extraneous causes, such as are known to the master, p. 122.**

**This duty is no less imperative by reason of the danger arising from tortious or felonious purposes or designs of third persons, p. 123.**

**The principle is that the master must make known all concealed dangers, pp. 123-125.**

The master, having performed his duty in furnishing suitable and reasonably safe premises and appliances, and a sufficient number of fit and competent servants to properly perform the required service, is yet under further obligation to his servant.

The servant not being familiar with his premises or appliances, if there are dangers latent or not exposed, and of which the master has knowledge, and the servant has not, either actual or presumed, they must be made known to the servant. If there are dangers which are obvious, yet not so much so that they can be seen at a glance or appreciated, the duty of the master, if they are not understood by the servant, or not likely to be known by him, to make them known to the servant, is equally plain. And if there are any dangers, either latent or patent, of which the master has knowledge, either actual or presumed, which the employé, either from his youth, inexperience, want of skill, or other causes, does not, or is presumed not to, understand or comprehend, they must be made known to him by the master; and this duty of the master is the same as to the machinery or appliances used or to be used by him. It is presumed that the master or the person placed in



charge of a hazardous business or department thereof is familiar with the dangers, latent and patent, ordinarily accompanying the business which he has in charge. The obligation is not discharged by informing the servant generally that the service in which he is engaged is dangerous; and more especially is this so when the servant is a person who neither by experience nor by education has, or would be likely to have, any knowledge of the perils of the business, either latent or patent. In such case the servant should be informed, not only that the service is dangerous, but of the perils of a particular place, and the particular or peculiar dangers that attend the service, if any. Of course, this rule would not require the employer to become responsible to his servant for any injury he might receive while in the employment of the master resulting from those dangers which are the subject of common knowledge, or which could readily be seen by ordinary observation. Such risks, as hereafter shown, and the dangers therefrom, are always assumed by the servant when he engages in the service.<sup>1</sup> So the negligence on the part of the master may consist solely in his failure of duty to instruct as to perils known to him, or which he ought to know.

<sup>1</sup> *Smith v. Peninsular Car-Works*, 60 Mich. 506, 27 N. W. 662.

To show negligence in the master, it must appear that the danger was such that the plaintiff would not be presumed to know it, and that the master did not give him information of it. *Pratt v. Prouty*, 153 Mass. 334, 26 N. E. 1002; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Rock v. Orchard Mills*, 142 Mass. 522, 8 N. E. 401; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 15 N. E. 579.

In *Ford v. Anderson*, 139 Pa. St. 263, 21 Atl. 18, it was said: "The liability of an employer does not spring from danger, but from negligence. But it may arise where, in the employment of a young person, he neglects to give sufficient instruction to the child of the service to be performed, or where there is a want of knowledge or experience."

The foregoing rule is stated thus broadly to cover almost every variety of cases that may arise. Of course, there are many cases where the application of the rule depends upon other considerations.

When a person of apparently sufficient age and physical ability and mental caliber to perform the service seeks an employment at the hands of a railway company or other master, he is held to an implied representation that he is competent to perform the duties of the position which he seeks, and competent to apprehend and avoid all dangers that may be discovered by ordinary care and prudence. In such cases, as was said by a learned court, "we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or convict the master for negligence in not doing so."<sup>2</sup>

Of course, the above rule applies to ordinary employments and occupations, not requiring peculiar skill, though, as to such as require experience, it may include, as I take it, a person seeking employment in a service in which efficiency is dependent upon experience, and in such case he impliedly represents that he possesses the requisite experience to perform satisfactorily and safely its duties. At least, it may be stated as a rule that an employé is presumed to know as much about the subject as may be observed by a person having a reasonable degree of experience in the employment upon which he enters.<sup>3</sup>

It must follow, as a logical result, that the master is only in duty bound to warn and instruct as to such defects and dangers as the servant is not presumed to know and

<sup>2</sup> *Pittsburgh, O. & St. L. Ry. Co. v. Adams*, 105 Ind. 152, 5 N. E. 187.

<sup>3</sup> *Lyttle v. Chicago & W. M. Ry. Co.*, 84 Mich. 289, 47 N. W. 573.

comprehend. There may be dangers and risks that attend the peculiar methods of the master's business, the peculiar character of his appliances, and situation of his premises, in which the presumption above stated would not apply; but, as to such, we may say they are controlled by another principle, which will be stated hereafter. We are now considering only such defects and dangers as are ordinarily incident to employments carried on in the usual way, and by ordinary and usual means and methods. The rule, therefore, is ordinarily applied to minors, and those who the master knows, or is charged with knowledge, are not experienced in the business.

Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and experience, to protect them from dangers incident to the situation in which they are placed; and, as a reasonable precaution in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employes concerning the dangers connected with their employment which from their youth and inexperience they may not, or are presumed not to, appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom.<sup>4</sup>

Yet the mere fact that the servant is a minor does not of itself affect the liability of the principal or master as to obvious defects and dangers, unless the minor was a child of unsuitable age to be exposed to unsuitable risks in a hazardous business. If a minor engages to work, the risks

<sup>4</sup> *Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466.

of the business are incident to the work, so far as he is competent to comprehend and appreciate them. And it can make no difference in the application of the rule whether such employment was with or without the consent of the parent. The father might collect the wages or exercise control over the minor; but it is not unlawful for the minor to engage in a service, not itself unlawful, though hazardous, and, having done so, he is subject to the incidental obligations of the position.<sup>5</sup>

<sup>5</sup> *De Graff v. Railway Co.*, 76 N. Y. 132; *Buckley v. Gutta Percha & Rubber Manuf'g Co.*, 113 N. Y. 540, 21 N. E. 717; *McGinnis v. Canada S. B. Co.*, 49 Mich. 466, 13 N. W. 819.

The fact that the plaintiff is a minor does not affect the question. If a minor engages to work, the risks of the business are incident to the work. He cannot claim, on account of infancy, to be relieved from the consequences of such risks. He might as well claim to enforce the contract for his wages without performing any service. If a child of unsuitable age should be employed in a hazardous business, or exposed to unsuitable risks, a different question might be presented. Here no question is presented but that the plaintiff was competent for the service which he was employed to render, and no negligence is imputed to the defendant for employing him on that account. *De Graff v. Railroad Co.*, *supra*.

The rule as to minors is very tersely stated by Justice Dean in *Tagg v. McGeorge*, 155 Pa. St. 368, 26 Atl. 671: "When young persons without experience are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazard of carelessness in their use. If the employer neglect this duty, or if he give improper instructions, he is responsible for the injury resulting from his neglect of duty. He is not answerable for injury to adults, nor for the injuries to young persons who have had that experience from which knowledge of danger may reasonably be presumed, and that discretion which prompts to care." He quotes language from an opinion in a former case (*Rummel v. Dilworth, Porter & Co.*, 131 Pa. St. 509, 19 Atl. 345, 346): "In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks

The youthful or inexperienced servant, however, cannot be supposed or assumed to have accepted in advance a peril which he cannot estimate, and which, from lack of experience, he could not have known.<sup>6</sup>

which they cannot properly appreciate, and to which they should not be exposed. The duty, in such case, to warn and instruct, grows naturally out of the ignorance and inexperience of the employé, and it does not extend to those who are of mature years, and who are familiar with the employment and its risks."

The same court, in *O'Keefe v. Thorn*, 16 Atl. 737, say, in reference to a boy, 14 years old, employed in a tin shingle factory for the purpose of shoving pieces of tin under a stamping machine, and who was injured the second day he worked by having his hand caught under the machine: "All machinery is dangerous, if not properly used. There was no danger in this particular machine that was not as obvious to a boy of 14 as to an adult. He could see that, if he placed his hand under the stamp, it would be crushed. If boys are not allowed to use machinery until they have become accustomed to its use, it would be difficult for them to have any useful trade or occupation by which to earn a livelihood." Judgment of nonsuit was affirmed.

It was said by the Massachusetts court of a boy 12 years of age, of average intelligence, who had worked for two months in a mill, and who was injured by coming in contact with uncovered gearing (*Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 15 N. E. 579): "In the absence of anything to show to the contrary, it must be assumed that the lad had the intelligence and understanding of one of his age. It must be assumed he knew the danger of coming in contact with the revolving wheels of the machine. There was no peculiar or secret danger. Anybody seeing the machine in motion must soon become aware of such danger. Explicit instructions would have added nothing to what he was presumed to know."

The supreme court of Wisconsin, however, in the recent case of *Chopin v. Badger Paper Co.*, 83 Wis. 192, 53 N. W. 452, held the master to a more strict rule as to his duty in the respect named, and in so doing would not presume that a boy 18 years old, of large experience with machinery, could comprehend and appreciate the

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<sup>6</sup> *Rummell v. Dilworth*, 111 Pa. St. 343, 2 Atl. 355, 363.

When there is any doubt as to whether the employé ought to have been acquainted with the risk, and the master was or was not chargeable with his want of knowledge,

danger of his hands coming in contact with revolving gearing. "It is true," the court say, "that any boy of a dozen years of age, who had ever seen cogwheels at work, would know that his hand would be injured if thrust between the cogs; but it is evident that knowledge of the probable result of the insertion of the hand, and appreciation of the risk or possibility that his hand might be accidentally drawn between the wheels, are two entirely different things." The question at once presents itself, what warning or information ought the defendant to have given the plaintiff? What could he have told him that he did not fully understand, and which was not perfectly obvious to his senses?

In *Tagg v. McGeorge*, *supra*, considerable force was given to the fact that the foreman in charge was urging the lad to prompt action. The trial court charged: "If the boy was not aware of the danger, and, his will being subject to that of the foreman, he obeyed him because he thought the foreman knew better, or because he was afraid to disobey him, you should find for the plaintiff." The supreme court say: "This instruction was exactly in accord with the law upon this subject as held by the court in *Lee v. Woolsey*, 109 Pa. St. 124, and *Kehler v. Schwenk*, 151 Pa. St. 519, 25 Atl. 130. In the case first cited, an adult employé was called upon by the master to execute in haste a dangerous duty, and it was said he could not be supposed to remember at the moment a danger of which he may have had previous knowledge. It would be unreasonable to demand of him the same care which would be expected in cooler moments, or in a more deliberate performance of the task. In *Kehler v. Schwenk*—the case of a boy over 14—we said: 'He could not be expected to have the will power of a grown man in resisting his master's orders. He cannot be held, therefore, as one who voluntarily engages in a dangerous service, especially by a master who specifically directed him to do hazardous work.' "

In the Massachusetts case cited, the injured lad was at the time of injury obeying an order of the overseer, accompanied with the command to hurry up; and yet that fact was not sufficient to influence the court in applying correct principles of law.

A boy 13 years of age was put to work upon a large machine,

the determination of the question is ordinarily for the jury.<sup>7</sup>

When, however, the minor or child knows, either from the nature of an obvious defect or otherwise, all the danger of which he could have been warned, then he cannot have been prejudiced by a failure to instruct as to such known and apparent dangers.<sup>8</sup>

which, by reason of his age and size, he could not successfully operate. He was allowed to use the machine for his own purposes, when not required by his employer. He was injured while so using the machine for himself. He did not testify as to his want of capacity, or want of knowledge of danger; yet it was held it was a question for the jury. *Wynne v. Conklin*, 86 Ga. 40, 12 S. E. 183.

Where the defendants' liability is predicated upon their negligence in the employment of an infant servant in a hazardous undertaking, and because the servant lacked the capacity to understand and appreciate the dangers, it is proper to charge that persons who employ children must anticipate the ordinary behavior of children, and must take notice of their lack of judgment, and must exercise greater care towards and for them than is required by law to be exercised towards and for adult persons; and that it is an actionable wrong to place and employ a child of such immature judgment as to be unable to comprehend the danger to work with or about a machine of a dangerous character, and likely to produce injury. *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502.

<sup>7</sup> *Id.*

<sup>8</sup> *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731; *Probert v. Phipps*, 149 Mass. 258, 21 N. E. 370; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 15 N. E. 579.

A boy 15 years old, of ordinary intelligence, cannot found a right of action on the failure of the master to warn him of the danger of catching his hand in a machine, on which he has worked two days, and the danger from which is obvious, and could not have been made plainer by instructions. *Coullard v. Tecumseh Mills*, *supra*.

It is not negligence to fail to instruct a boy of 17 as to the danger of putting a finger between the roll and the hot cylinder of a simple machine, where he has worked for six months on a substantially similar machine. *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E.

*Ciriack v. Merchants' Woolen Co.* was a case of a boy of the age of 12 years, of average intelligence, who had worked for two months in the same room with, but not upon, certain machines, the rapidly revolving gearing of which was upon the outside and in plain sight. While obeying an order of the overseer to go up between the machines to look for a tool, and to hurry up, he became entangled in the gearing, and was injured. The court say: "The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment. In order to show actionable negligence on the defendant's part, it was incumbent upon the plaintiff to show an omission to inform him of something which he needed to know to make him safe. There is no reason to suppose that explicit instructions, if given to him at the beginning of his employment, in reference to the danger of touching those wheels when in motion, would have added anything to what he must fairly be presumed to have known at the time of the accident. It would be carrying the doctrine of holding employers to the duty of giving reasonable instructions to their servants quite too far, to require a special caution every time a boy is sent on an errand under

344. Nor is it negligence to fail to instruct a boy of 12 with reference to the danger of cogwheels from his coming in contact with them, the danger from which should have been obvious. *Ciriack v. Merchants' Woolen Co.*, supra. But if the evidence tends to show the boy had less than average intelligence, that the place was dimly lighted, that he had not before worked so near the wheels as to be in danger, and the order was imperative, calling for haste, it was not error to submit the case to the jury. *Id.*

If a boy of 19 undertakes to work on a dangerous machine, understanding the danger, he cannot recover on the ground that the machine would not have been dangerous if guards had been used. *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368.



circumstances like those disclosed in the present case." The case of *Coombs v. New Bedford Cordage Co.*<sup>9</sup> so often quoted by courts, was distinguished, and the decision in that case was expressed to have been placed upon the ground that there the servant had been at work only one day, and, under the circumstances, the evidence of the nature of the work, and the position in which to do it, was considered to warrant the jury in finding that the plaintiff was manifestly incapable of understanding and appreciating the dangers to which he was exposed by the gearings, and manifestly incapable of performing the work there with safety. No question was raised in this case \* that the machinery or method of work was unnecessarily dangerous, or that the attention of the employé was engrossed with his errand, and thus necessarily diverted, which distinguishes this case from *Coombs v. New Bedford Cordage Co.*, and many others where a different result obtained.

The case also differs from that class where the question of a youth's capabilities to understand and comprehend dangers was involved, such as *Steiler v. Hart*<sup>10</sup> and *Railroad Co. v. Fort*.<sup>11</sup> In the former it was held that whether a machine was a perilous one, as well as whether a boy of 13 was too young to understand its dangerous character, or appreciate the danger to him in operating it, were questions for the jury. The negligence there consisted, if any there was, in putting a person to work upon a perilous machine, who was incapable, by reason of his youth, of understanding the risk or appreciating the danger. So in *Railroad Co. v. Fort* the negligence consisted in sending a boy who was too young to appreciate the danger to adjust dangerous machinery. It was held that he had a right to rely upon

\* *Ciriack v. Merchants' Woolen Co.*, *supra*.

<sup>9</sup> 102 Mass. 572.

<sup>10</sup> 65 Mich. 644, 32 N. W. 875.

<sup>11</sup> 84 U. S. 555.

the judgment of his superior in obeying his orders; that he could not be expected to know the perils of the undertaking. It is true that the work attempted was outside his employment, and it was held a risk not assumed; but I do not understand these elements were controlling in the minds of the court, or but what, if eliminated, the result would have been the same.

When a servant is set to work by the master upon a dangerous machine, without giving him proper instructions or caution, to show negligence on the part of the master, even when such servant is a minor, it must appear that the danger was such that the plaintiff would not be presumed to know it, and that the master did not give him information of it. It is not enough that he did not in fact have knowledge of it. A youth may not realize all the possible consequences of the danger; yet if he knows and appreciates a danger of being hurt, and he is injured by the means which he apprehended were likely to cause him injury, he cannot be heard to say that he did not realize or appreciate the extent to which possible injury might be thus caused to him.<sup>12</sup> In a recent case in Massachusetts<sup>13</sup> the general rule is firmly adhered to. There a boy somewhat over 16 years of age, and at least of ordinary intelligence, was put to work on a picker in a woolen mill. He learned that the machine was dangerous from being told so by those setting him at work and running it, and from helping to clean it several times. It was a part of his duty to gather up, and put back into the machine, wool blown out of it from an opening therein about two feet from the floor, and a foot high by about four feet wide, near the mouth of which was a revolving cylinder with teeth on it. In doing

<sup>12</sup> *Pratt v. Prouty*, 153 Mass. 334. 26 N. E. 1002.

<sup>13</sup> *Tinkham v. Sawyer*, 153 Mass. 485. 27 N. E. 6.

so, he had to work carefully, as he knew, because the floor was very slippery. The next day, when at work near the opening, he slipped, his arm went in, and he was injured. The court say: "Upon these facts, it is clear the defendants were not negligent in failing to warn or instruct him as to the danger. It is difficult to see what they could have told him that he reasonably could not be expected to know. It is plain, also, that the plaintiff understood and appreciated the risks of the employment in which he was engaged, and that the injury, if not due to one of those accidents for which nobody can be said to be to blame, happened from his own want of care in placing himself so near the machine that his arm or some portion of his body would go into it. The defendants were not bound to cover the opening, even if the process which the machine performed would have permitted it." The last sentence is in conflict with what was held in *Nadau v. White River Lumber Co.*<sup>14</sup> That decision was placed upon the ground that the premises were unnecessarily dangerous; that the cogwheels ought to have been covered, so that from mere inadvertence the employé would not be subjected to risk. To this case and the principles applied we shall have occasion to refer in a subsequent part of this work.

The employé is entitled to all the information the employer may possess with regard to the danger of the employment arising from extraneous causes, to enable him to determine for himself whether, at the proffered compensation, he will assume the risk and incur the hazard.<sup>15</sup>

The facts of the case of *Baxter v. Roberts* are somewhat novel, and strongly illustrate the above principle. There the plaintiff was a carpenter who received a gunshot wound

<sup>14</sup> 76 Wis. 130, 43 N. W. 1155.

<sup>15</sup> *Baxter v. Roberts*, 44 Cal. 188.

from persons unknown. The facts were that the defendant was the owner of a certain lot covered by water, which had been inclosed by him with a fence, and he employed the plaintiff to go with him upon those premises, and perform labor there as a carpenter. Upon reaching there they commenced to tear away some boards from a fence newly erected thereon, when they were fired upon from a shanty situated upon a neighboring lot, by which plaintiff received his injury. The evidence tended to show defendant knew, or had such information as would reasonably lead him to believe, that his interference with the newly-erected fence would be forcibly resisted by those who occupied the shanty, and who had announced their purpose to resist by force any interference therewith. The court say: "There is no doubt that if the employer have knowledge or information showing that the particular employment is, from extraneous causes, known to him to be hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employé to be, he is bound to inform the latter of the fact. These elementary principles are usually applied to cases in which the employé has sustained injury by reason of some defect or unsoundness in the machinery or materials, unknown to him, about which he is employed to perform labor, and of which the employer knew, or might have known by the exercise of diligence on his part. The general principle which forbids the employer to expose the employé to unusual risk in the course of the employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known by the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer, and through agencies beyond his control. The employé is as clearly entitled to information of such known danger of

that character as of any other, the existence of which is known to the employer."

Another case illustrating the doctrine of uncomprehended danger arising from an employment is that of *McGowan v. La Plata Mining & Smelting Co.*<sup>16</sup> There a servant was injured by hot slag being overturned in water that was in front of the furnace, causing an explosion. The question was whether the servant, whose duty it was, and who was engaged in the performance thereof, to carry such slag from the furnace, should have been informed of the dangers resulting from the contact of the slag with water. The court said: "The servant must be assumed to have knowledge of natural laws, and of the knowledge of dangerous forces that come to every man of sound mind; and therefore the servant could not have recovered simply for an injury caused by spilling the slag upon himself. But the explosive power of hot slag when cast into water is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosion. It is not so much a question whether the injured party has knowledge of all the facts of his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself, of which he should be informed."<sup>17</sup>

Another case coming within the principles of the last was that of *Fox v. Peninsular White Lead & Color Works*;<sup>18</sup> and it was there said that "a servant is not presumed to

<sup>16</sup> 9 Fed. 861.

<sup>17</sup> *Smith v. Peninsular Car-Works*, 60 Mich. 501, 27 N. W. 662; *O'Connor v. Adams*, 120 Mass. 430.

<sup>18</sup> 84 Mich. 676, 48 N. W. 203.

know the effects that may be produced upon him while working in the manufacture of Paris green; and that it is the duty of the master to inform him, not only that the ingredients are poisonous, but also of the liability of the person to become poisoned by inhaling or otherwise coming in contact with their fumes."

The principle, in short, is that the master is bound to make known all concealed dangers;<sup>19</sup> and his duty is no less in this respect where the employment itself is free from danger, and the existing perils grow out of extrinsic causes and circumstances not discernible to the ordinary observer.<sup>20</sup>

The rule was carried, perhaps, further than the weight of authority will warrant in the case of *Parkhurst v. Johnson*.<sup>21</sup> That was a case where the master employed an inexperienced laborer, and set him at work at his lime kiln. The method of work was to remove the burned stone at the base, and, by standing on the mass above, crowd it down into the space left at the base, stepping off as it dropped. The servant, while doing this work with others, by reason of his inexperience failed to step off in time, and went down into the crater, and was killed. The employer was held liable. The danger was obvious; the employment required no skill. The master had a right to assume he knew as much of the peril as his observation and common knowledge would suggest. It was, however, held in that state, and in accordance with the current of authority on that subject, that, where an inexperienced person sought the position of brakeman, he could not be

<sup>19</sup> *Dowling v. Allen*, 74 Mo. 13.

<sup>20</sup> *Perry v. Marsh*, 25 Ala. 659; *Spelman v. Fisher Iron Co.*, 56 Barb. 151.

<sup>21</sup> 50 Mich. 70, 15 N. W. 107.

heard to claim that he was not instructed in the duties of such employment. The position sought was one of known danger. It required no special skill or training to foresee that it was dangerous. He assumed the ordinary risks of such employment. He cannot be heard to say, "I sought the position with the full knowledge of my inexperience, but you knew it, and therefore insured me against injury."<sup>22</sup> The same was held in *Alexander v. Railroad Co.*,<sup>23</sup> where the master knew of the servant's inexperience; and held in part in Iowa,<sup>24</sup> to the extent that where the master has no knowledge of the fact of his inexperience, he has the right to assume that the servant contracts that he has the experience to properly perform the duties of his position, and that he knew at least the obvious dangers attending the employment.

Failure on the part of the master to give instruction to his servant, where it is his duty so to do, will not relieve him from responsibility for the negligent act of a fellow servant, causing him injury, where the servant had not acquired knowledge of such dangers. It is only when he has been properly instructed, and knows the dangers of his employment, that he stands upon the same footing as any other employé, and cannot recover for an injury caused by a fellow servant.<sup>25</sup>

The books are full of cases that relate in some manner to the doctrine herein stated. I have not attempted to

<sup>22</sup> *Dysinger v. Railway Co.*, 93 Mich. 646, 53 N. W. 825.

<sup>23</sup> 83 Ky. 589.

<sup>24</sup> *Mayes v. Railway Co.*, 63 Iowa, 568, 14 N. W. 340, and 19 N. W. 680.

<sup>25</sup> *Jones v. Florence Min. Co.*, 66 Wis. 283, 28 N. W. 207; *Curran v. Merchants' Manuf'g Co.*, 130 Mass. 374; *Anderson v. Morrison*, 22 Minn. 274.

collect them, and have selected some of the more important, having a direct bearing as illustrating the application of the rule and exceptions. For others that also apply, see table in footnote.<sup>26</sup>

<sup>26</sup> Table of cases: *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 344; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 15 N. E. 579; *Wheeler v. Wason Manuf'g Co.*, 135 Mass. 294; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396; *O'Connor v. Adams*, 120 Mass. 427; *Curran v. Merchants' Manuf'g Co.*, 130 Mass. 374; *Ryan v. Tarbox*, 135 Mass. 207; *Cayzer v. Taylor*, 10 Gray, 274; *Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466; *Glover v. Dwight Manuf'g Co.*, 148 Mass. 22, 18 N. E. 597; *Atkins v. Merrick Thread Co.*, 142 Mass. 431, 8 N. E. 241; *Rock v. Indian Orchard Mills*, 142 Mass. 522, 8 N. E. 401; *Jones v. Florence Min. Co.*, 66 Wis. 268, 28 N. W. 207; *McGowan v. La Plata Min. Co.*, 9 Fed. 864; *Pratt v. Prouty*, 153 Mass. 334, 26 N. E. 1002; *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152, 23 N. E. 829; *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731; *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. 6; *Probert v. Phipps*, 149 Mass. 258, 21 N. E. 370; *Gates v. State*, 128 N. Y. 221, 28 N. E. 373; *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. 807; *Stackman v. Railway Co.*, 80 Wis. 428, 50 N. W. 404; *De Graff v. Railroad Co.*, 76 N. Y. 125; *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147; *Cook v. Railway Co.*, 34 Minn. 45, 24 N. W. 311; *Woutilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551; *Berger v. Railway Co.*, 39 Minn. 78, 38 N. W. 814; *Craver v. Christian*, 36 Minn. 413, 31 N. W. 457; *Carroll v. Williston*, 44 Minn. 287, 46 N. W. 352.



## CHAPTER VIII.

### MASTER'S DUTY (Continued)—DELEGATION OF.

The master's duty respecting the furnishing and repair of appliances, providing a safe place to perform the work required, making adequate rules, employing servants, and instructing them as to the dangers accompanying their services, is personal, and cannot be delegated, p. 129.

He may delegate the performance of the duty, but, in so doing, the responsibility remains, p. 129.

As to repair of appliance, some courts hold that duties of such character are not personal to the master, and may be delegated, and the master relieved from responsibility for negligence in the manner of their performance, pp. 129, 130.

The rule is not applicable to the construction of an appliance, p. 129.

The master's duty, in such a case, is met when he provides suitable materials, and trusts the duty of construction to skillful workmen, p. 130.

The latter rule has been applied to a building in process of construction, pp. 130, 131.

Courts differ upon the question of what duties are personal to the master, but the rule in all of them is that, where such duties are declared to be personal to the master, the performance thereof cannot be delegated by him to another, so as to relieve him from responsibility for the manner of their performance, p. 131.

**The rule in New York, Massachusetts, Michigan, Wisconsin, Maine, and the federal court stated, pp. 131, 133, 135-139.**

**The rule in each state stated and discussed in subsequent chapters, p. 140.**

The duties hereinbefore stated as devolving upon the master are such in character that the performance thereof in proper cases cannot be delegated by him to another, so as to excuse him from responding in damages to a servant who has received injury, either by their not being performed or being negligently performed. If the master choose, he may delegate the performance of the duty, but, in so doing, the responsibility remains.<sup>1</sup>

There is much confusion among the authorities upon the question as to whether the master's duty and responsibility end short of a complete performance. There is but little difference among them as to his responsibility where there is neglect in furnishing proper and reasonably safe instrumentalities in the first instance, but the principal contention is as to the master's duty in keeping and maintaining them in such reasonably safe condition. In the federal courts, the courts of New York, Wisconsin, Maine, and many others, the doctrine is that the master is presumably present all the time, even in the performance of the actual labor; while in Massachusetts and some other states this extreme is not held in the case of corporations, but rather that when the master has used due care in the first instance, and provided suitable and reasonably safe appliances, and provided suitable means for keeping and maintaining them in

<sup>1</sup> Morton v. Railway Co., 81 Mich. 433, 46 N. W. 111; Northern Pac. Ry. Co. v. Herbert, 116 U. S. 650, 6 Sup. Ct. 590; Laning v. Railway Co., 49 N. Y. 521; Van Dusen v. Letellier, 78 Mich. 502, 44 N. W. 572; Wheeler v. Wason Manuf'g Co., 135 Mass. 294.

proper repair, and employed competent servants to see that the means were properly used, it has fulfilled its duty.

The Massachusetts rule is applied in the federal court, and in those holding the extreme doctrine, as to appliances and structures in process of construction. The rule is thus stated: When the master undertakes to build an appliance or staging, or have it built under his personal supervision, he is liable for any defect or insufficiency in the structure which due care on his part would have avoided.<sup>2</sup> But when the master retains no supervision over the erection of the staging or apparatus, gives no direction in regard to it, but provides suitable materials therefor, and trusts the duty of the erection to skillful workmen, he is not liable to one of the workmen for injuries resulting from the insufficiency of the manner of construction, or use of imperfect materials, where sufficient that were perfect were furnished.<sup>3</sup>

This rule was applied by the Wisconsin court where a railroad company was building a water tank, and, for the purpose of placing heavy timbers in place, furnished a derrick in parts, but complete, which had to be put together and adjusted upon the ground. Injury was caused to a workman by the falling of the derrick, caused by the

<sup>2</sup> *Peschel v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338, 21 N. W. 269; *Arkerson v. Dennison*, 117 Mass. 407; *Behm v. Armour*, 58 Wis. 1, 15 N. W. 806; *Manning v. Hogan*, 78 N. Y. 615.

<sup>3</sup> *Peschel v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338, 21 N. W. 269; *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *Johnson v. Boston Towboat Co.*, 135 Mass. 209; *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31, 14 N. W. 60; *McAndrews v. Burns*, 39 N. J. Law, 117; *Wilson v. Merry*, 19 Law T. (N. S.) 33; *Tarrant v. Webb*, 86 E. C. L. 796; *Searle v. Lindsay*, 103 E. C. L. 429; *Wonder v. Railway Co.*, 32 Md. 414; *Lyttle v. Railway Co.*, 84 Mich. 289, 47 N. W. 571.

insecure manner in which a post to which one of the ropes staying the appliance was attached, was set in the ground, or by the manner in which such rope was attached to it. Justice Taylor made a vigorous dissent, expressing his views very forcibly and clearly, and it cannot be said they were without support. His chief ground for dissent was that the derrick was an appliance complete in and of itself, and the same rule should be applied as would be by that court to any completed machine used in doing any of the work.

Care must be taken not to confound the doctrine of the rule in question with that relating to the concurring negligence of the master and a fellow servant, for which the master is liable. The distinction is plainly well settled.

In *Armour v. Hahn*<sup>4</sup> the rule under consideration was applied to a building in process of construction.

In *New York*<sup>5</sup> the rule is stated in these words: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of ordinary care in respect to such acts and duties as it is required to perform and discharge as master and principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed; and hence a true test is whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." The force of this decision was felt throughout the states, and it became at once a leading case upon the subject, the doctrine of which as announced was adopted by many. This doctrine was more fully expressed in a later case.<sup>6</sup> The able opinion is so complete that we quote from it at consid-

<sup>4</sup> 111 U. S. 313, 4 Sup. Ct. 433.

<sup>5</sup> *Flike v. Railway Co.*, 53 N. Y. 549.

<sup>6</sup> *Fuller v. Jewett*, 80 N. Y. 46.

erable length; and we may aptly say right here that the student and practitioner will profit if they study well the reasoning of the courts upon this, perhaps the most important, question of the entire subject, and the distinctions drawn by the courts. This they must do if they expect to master and comprehend the underlying principles applicable to it.

The claim was made that the defect in the boiler which was the cause of the injury was due to the negligence of the mechanics, to whom it had been intrusted for the purpose of repair, in doing that work. There was no question as to the competency or want of skill of such persons, or of the superintendent, nor but that the officers and agents had properly done their duty in directing the work to be done. It was claimed that such mechanics were co-employés of the persons injured in the service of the company, for which the defendant and the common employer is not responsible. The court say: "We understand the principle to be that acts which the master, as such, is bound to perform for the safety and protection of his employés, cannot be delegated, so as to exonerate the former from liability, to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere coservant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do, by selecting competent servants or otherwise, to secure the

safety of his employes. It is sometimes difficult to determine what is the master's duty within the rule; but when it is ascertained that the negligence by which an employé is injured relates to this duty, then there is no middle ground, and the case cannot be determined upon any distinction founded upon the particular grade of function of the negligent agent or servant. In the *Flike Case*<sup>7</sup> it was probably impracticable for Rockefeller to be present at the starting of each train, and to see personally that when it left the yard it had its full equipment of men. He appointed sufficient brakemen to go with the train which parted and caused the injury, and one of them neglected to go. The negligence of the company consisted in not seeing to it that the train was sufficiently manned when it started, and it did not excuse itself by showing it had promulgated proper rules, and appointed a head conductor of this business, or that the train would have been fully manned if Loftus, the brakeman, had performed his duty."

The rule in some of the states is not so pronounced that it is safe to state concisely what it is. Thus, in Michigan no rule seemed to be clearly settled by the earlier decisions; in other words, the New York rule was not applied to the extent that it was at home. In *Fox v. Iron Co.*,<sup>8</sup> however, the court state that they have adopted the New York rule. Yet that statement does not appear to be decisive of the status of that court upon the particular question; as the language otherwise used is entirely consistent with the doctrine as held in Massachusetts. What the master's exact duty may be is not stated.

In *Sadowski v. Car Co.*<sup>9</sup> the doctrine of the court was

<sup>7</sup> 53 N. Y. 549.

<sup>8</sup> 89 Mich. 393, 50 N. W. 872.

<sup>9</sup> 84 Mich. 106, 47 N. W. 598.

thus expressed: "Those employed by the master to provide and keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from the operatives. Such duties cannot be delegated by the master so as to relieve him from responsibility." It will be observed that no mention is made of the master's duty to keep in repair the machinery. The court quote approvingly the language of the court in *Ford v. Fitchburg Ry. Co.*:<sup>10</sup> "The agents who are charged with the duty of supplying safe machinery are not, in a true sense of the rule, to be disregarded as fellow servants of those who are operating it. They are charged with a master's duty to the servant. They are employed in separate and distinct departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require." They also quote from the opinion in *Northern Pac. R. Co. v. Herbert*:<sup>11</sup> "The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it." In a former decision in *Railway Co. v. Austin*<sup>12</sup> the court held that where a railroad track was defective and unsafe, owing to the neglect of the trackmen, the servant injured by means thereof could not recover of the master, as such trackmen were fellow servants, and the risk of such a track was one assumed; and in *Smith v. Potter*<sup>13</sup> it was held that an inspector of cars was a fellow servant, whose neglect was a risk assumed by the operatives of the road; while in *Morton v. Railway Co.*<sup>14</sup> it was held to be the master's duty to inspect chains to be used,

<sup>10</sup> 110 Mass. 240.

<sup>11</sup> 116 U. S. 650, 6 Sup. Ct. 590.

<sup>12</sup> 40 Mich. 247.

<sup>13</sup> 46 Mich. 258, 9 N. W. 273.

<sup>14</sup> 81 Mich. 433, 46 N. W. 111.

and for a lack of such inspection by the person whose duty it was so to do, whereby injury was sustained by the servant, the master was responsible; and in *Van Dusen v. Letellier*<sup>15</sup> it was held that it was the master's duty to inspect the premises, and, if negligently done by one whose duty it was to perform that service for him, the master was liable for an injury sustained by a servant by reason of a defect which might have been discovered by proper inspection or diligence. *Railway Co. v. Austin*, and *Smith v. Potter*, are not overruled or disapproved in direct terms. Whether it was intended that they should be reversed so far as they express the principle upon which liability was founded is not exactly certain; nor is it certain whether it was intended by the later cases to adopt the rule as actually held in New York and in the federal court in full, or only to the extent as held in Massachusetts. The rule in Michigan is fully discussed in the chapter on Fellow Servants,<sup>16</sup> and the conclusion reached that at the present time those servants engaged in repair of appliances directly represent the master.

In Wisconsin, as early as 1869, in *Cooper v. Milwaukee & P. D. C. Ry. Co.*<sup>17</sup> the supreme court seem to have assumed that persons employed in repairing the track and operatives upon trains were fellow servants. In that case the facts were that the section men took up three rails at one time, and put up a warning flag in such a position and so near the space that sufficient warning was not given an approaching train, which ran off the track at that point, and the plaintiff's intestate, a brakeman, received fatal injuries. The question was distinctly raised by the brief of

<sup>15</sup> 78 Mich. 502, 44 N. W. 572.

<sup>16</sup> Chapter 14, p. 266.

<sup>17</sup> 23 Wis. 668.



plaintiff's counsel that the section boss and the intestate were not fellow servants; that they were not engaged in the same branch of the service. Judge Dixon, in the opinion of the majority of the court, says: "The act of the brakeman in giving warning in the manner stated, as well as the omission of the section boss to personally see that the warning was properly given, and his act in taking up three rails at a time, may have been negligence; yet it was of no purpose, so long as it was not shown that the company had been negligent in the employment of those persons, or in retaining them in its service;" that the negligence of the company in this respect was the gist of the action. Justice Paine dissented on the ground that the injured servant was not a fellow servant with those whose negligence caused him injury; and it is very evident that, at the time, the court assumed that they were such fellow servants, and, being so, no recovery could be had, unless it was shown that the trackmen or boss was incompetent, which fact was known to the master. The case is now frequently approved, but generally, only, as to what it decides upon the question of incompetent servants.

In *Bessex v. Railway Co.*<sup>18</sup> it was held that the duty of the railroad company was to keep its track in proper repair, and maintain it in a reasonably safe condition for use, and that the neglect of the persons selected to attend to this duty was the neglect of the company; that the misconduct or negligence of the officer or employé whose duty it is to attend to these things, and who, *pro hac vice*, represents the company in the matter, is the negligence of the company itself. This language was used with reference to a foreman in shops and a master mechanic. The language used was applied to the particular facts, and, the decision made in

<sup>18</sup> 45 Wis. 482.

*Cooper v. Railway Co.* remaining, and not being overruled or dissented from, the question was still at least an open one as to the status of sectionmen towards operatives upon the road.

In the later case of *Hulehan v. Railway Co.*<sup>19</sup> it was held that a section boss is not a fellow servant of the operatives, and that for his negligence in permitting the track to become unsafe for the coupling of cars by an employé, by reason of obstructions, the company is liable. And in *McClarney v. Chicago, M. & St. P. Ry. Co.*<sup>20</sup> the court say: "It would hardly seem necessary to state that it was the duty of the defendant to keep its track free from obstructions which render the moving of the cars upon it dangerous to its employés, and that the company is under obligations to see that this duty is performed by some one. This is a duty or implied contract which the master must perform by himself or some other; and until it is performed, his duty, from the implied contract, is not kept or fulfilled." This is in its broadest sense the doctrine of the New York courts, and in later cases, as well as in *Heine v. Railway Co.*,<sup>21</sup> the New York rule is adopted and applied as to machinery and its repair to its full extent.

In Maine,<sup>22</sup> Justice Danforth lays down the rule in that state. In speaking of the risks assumed by the servant (which involves this question of the master's duty and delegation of power), he says: "These risks include the use, not the purchase, of the machinery, as well as the dangers resulting from the carelessness of the employés; not the responsibilities of the hiring in the first instance. The servant has no more responsibility over the repairs than of the

<sup>19</sup> 68 Wis. 256, 32 N. W. 529.

<sup>20</sup> 80 Wis. 278, 49 N. W. 963.

<sup>21</sup> 58 Wis. 525, 17 N. W. 420.

<sup>22</sup> *Shanny v. Androscoggin Mills*, 66 Me. 420.

purchasing; no more responsibility for the one than the other. The use of it is for him; and the risk of that use, whatever it may be, he assumes. That comes within his contract, but, as a part of the same contract, the employer provides the means of carrying on the business, and, as a matter of course, he assumes the responsibility that his work shall be done with due care; and as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same condition as at first. Again, he says: The person whose duty it is to keep the machine in order, so far as that duty goes, is not in any legal sense the fellow servant of the plaintiff. To provide machinery, and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common results. The one can properly be said to begin where the other ends. The two persons may indeed work under the same master, and receive pay from the same source; but this is not sufficient. In the repair of the machinery the servant represented the master in the performance of his part of the contract, and therefore his negligence in that respect is the omission of the master or employer, in contemplation of law. The plaintiff, so far as regards the repair of the machinery, stands in the same position as any person not a servant, but who was rightfully in her position; and the same responsibilities and liabilities rest upon the master for acts of himself or servant as would in such case."

The same doctrine is expressed in *Davis v. Central V. R. Co.*<sup>28</sup> In speaking of the relations existing between the master and his servant, the learned judge, in delivering the

<sup>28</sup> 55 Vt. 91.

opinion, says: "It implies that if the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workmen, the master is liable therefor. The question is naturally suggested why should he not also be liable for the negligence of the agent or servant, whom he has appointed to discharge the same duty in his stead, although he has exercised due care to select a person competent and skillful? Is such an agent or servant, while performing the duty cast by the relation upon the master, a fellow workman with the master's servant in the employment, in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so, the master who performs his part of the duty,—as this defendant and all corporations must,—by agents and servants, secures an immunity from liability which the master who personally enters the service to manage and direct the performance of the work does not enjoy."

The doctrine held in Massachusetts and some other states is best expressed by the court in *Johnson v. Boston Tow-boat Co.*:<sup>24</sup> The defendant was under obligation to its servants to use reasonable diligence to maintain in suitable condition the appliances furnished for their use. If the defendant exercised that diligence, and provided suitable means for keeping its appliances in proper condition, and employed competent servants to see that the means were properly used, it had fulfilled its duty. When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in

<sup>24</sup> 135 Mass. 211.

the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants, in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in the business is engaged in the common service. Thus, a person charged with the duty of keeping the track of a railroad company in repair;<sup>25</sup> the chief engineer of a vessel whose duty it was to see the machinery was kept in order.<sup>26</sup> They quote the language of Fletcher, J., in *King v. Boston & W. R. Co.*:<sup>27</sup> "If a corporation itself should be held responsible to its servants, that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterwards would seem to be the work of servants or laborers, as much as any other part of the business of the corporation."

The mere exercise of due and reasonable care on the part of the master in selecting such agents as are clothed with the powers and duty of the master will not excuse him for their carelessness or failure of duty. The duty being that of the principals, and theirs the contract, it is theirs to fulfil and perform; and if this duty is not done, or insufficiently done, the failure to do is theirs.<sup>28</sup>

I have at some length thus quoted from opinions of the courts upon this important question, for the purpose of placing before the reader the reasoning upon which the rule or principle is based. Ofttimes the reason is far more important than the mere result in a given case. The question of who are and who are not fellow servants, in many

<sup>25</sup> Citing *Waller v. Railway Co.*, 2 Hurl. & C. 102.

<sup>26</sup> Citing *Searle v. Lindsay*, 11 C. B. (N. S.) 420, and other cases.

<sup>27</sup> 9 Cush. 112.

<sup>28</sup> *Lanng v. Railway Co.*, 49 N. Y. 521.

cases, is made to depend upon the rule of delegation of authority, and therefore the reader will find in subsequent chapters devoted to a discussion of the question of fellow servants more particularly what the rule is in each state as to the doctrine of delegation of authority.

## CHAPTER IX.

### ASSUMED RISKS—MASTER'S DUTIES AND METHODS.

The master may conduct his business in his own way, although another method might be less hazardous, p. 145.

The servant assumes the risk of the more hazardous method, if he knows the danger attending it, p. 145.

When the servant is not chargeable with such knowledge, he may assume—and such is the contract—that the only dangers and hazards to which he will be subjected are such as are ordinarily and naturally incident to the service which he is to perform, p. 150.

In most cases the real question to be determined is the fact of the servant's knowledge, either actual or presumed, of the dangers, p. 155.

To ascertain when knowledge may be presumed involves an inquiry as to the servant's duties, p. 157.

The servant, upon entering the service, should ascertain what he is expected to do, p. 158.

He must exercise care to avoid injury to himself, p. 159.

He must take ordinary care to learn the dangers that are likely to beset him in the service, p. 160.

He must improve every opportunity to do this, exercising reasonable care in examining his surroundings, p. 161.

**He must observe and take cognizance of such dangers as can be appreciated by observation, p. 162.**

**He is bound to take notice of the operation of familiar laws, and govern himself accordingly, p. 163. .**

**He is bound to use his eyes; and if the defect is obvious or suggestive of danger, knowledge will be presumed, p. 164.**

**The duty of the master, in such case, is not to see that the servant actually knows, p. 166.**

**The master's duty is met when he constructs and maintains his appliances in such manner that they are reasonably safe when prudently used, p. 167.**

**The degree of care on the part of the servant is that which prudent men under similar circumstances would exercise, p. 168.**

**Negligence in a servant may consist in failing to know, p. 168.**

**A workman using appliances must exercise proper care to keep them in order, p. 169.**

**He must see that repairs are made, if that is within his duties; if not, report their condition, p. 169.**

**Servant using machinery he knows to be defective is bound to use special precautions, p. 169.**

**If he adopts the more dangerous method of doing his work, because it is convenient, the risk is his, p. 169.**

**He will be charged with knowledge of defects which are obvious, or which by proper diligence he might discover, in instruments he is frequently using, p. 169.**



This is only true when he understands the risk to which he is thus exposed, p. 170.

The same rule applies to the master, who is not liable for injuries caused by known defects, unless he knew, or ought to have known, them to be dangerous, p. 170.

The rule is that a servant assumes the hazards of dangerous methods, as well as the use of defective tools or machinery, when after employment he learns of the defect, but voluntarily continues in the employment without objection, p. 170.

He assumes the risks from causes open and obvious, the dangerous character of which he had an opportunity to ascertain, p. 171.

This is true, even though at the time of injury he was in the performance of duties he did not contract to render, if the dangers were such that it required no special skill or training to foresee them, p. 171.

Perils of the employment include such as it is a part of the servant's duty to take knowledge of by observation, p. 172.

Some courts make an exception to the foregoing rule, holding that the servant only assumes such risks as he knows the precise danger of, p. 172.

The rule and the exception illustrated by decisions, p. 173.

Conclusion from the decisions, p. 179.

The relations of the parties rest in contract, imposing mutual obligations, regulated by legal principles and presumptions; these are stated, p. 180.

It is to be observed that persons or companies, and especially corporations, whose interests are large and business complex in character, and who necessarily have to intrust the management and performance of their business to officers, agents, and servants, do not always adopt such a method of conducting their business as to meet the requirements of duty as measured by the standard hereinbefore stated and discussed. There are many classes of business, such as the operation of large factories and the management and operation of railroads, which are attended with great risks and perils; and the utmost, or even ordinary, prudence, is not exercised, either in the manner of constructing their structures, providing machinery and appliances, or in their operation. If the strict rule of duty in these respects was always required, then it would be that many, if not most, of the enterprises of such character, which add so much to the convenience and material prosperity of the people, would have to be abandoned. Therefore it has come to be well settled that the master may conduct his business in his own way, although another method might be less hazardous; and the servant takes the risk of the more hazardous method, as well, if he knows the danger attending the business in the manner in which it is carried on. Hence, if the servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the employer because he may be able to show there was a safer mode in which the business might have been carried on, and that, had it been conducted in that manner, he would not have been injured.<sup>1</sup>

Therefore the liability of a master to respond to his

<sup>1</sup> Naylor v. Chicago & N. W. Ry. Co., 53 Wis. 661, 11 N. W. 24; Stephenson v. Duncan, 73 Wis. 406, 41 N. W. 337; Gilbert v. Guild,

servant in damages for an injury received while in the scope of his employment does not necessarily follow upon proof made that such injury was the result of the failure

144 Mass. 601, 12 N. E. 368; *Sullivan v. India Manuf'g Co.*, 113 Mass. 398.

#### **Safer Mode.**

The complaint in *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368, was, in substance, that the machine would not have been dangerous had guards been used. The court say: "The ground of the plaintiff's right of action was that he was injured in performing dangerous work that he was put to do by the defendants. The machine was dangerous only because there was danger in working upon it; and if, in fact, it was dangerous, it was immaterial that the danger might have been averted by appliances protecting against it. The defendants are not liable to the plaintiff because they used a dangerous machine, but because they employed the plaintiff to use it in ignorance of the danger. If the plaintiff undertook the work knowing the danger, the defendants are not liable to the plaintiff, although they might have prevented the danger by guarding against it. If the plaintiff did not know of the danger, proof that the defendants could not have guarded against it would be no defense. Want of due care by the plaintiff, or knowledge of the danger by him, which the jury must have found if they found the machine to be dangerous, would have prevented a recovery, equally whether the defendants could or could not have guarded against the danger."

As was said by the same court in *Sullivan v. India Manuf'g Co.*, 113 Mass. 398: "When he [the servant] assents to occupy the place prepared for him, and incurs the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might with reasonable care, and by reasonable expense, have been made safe. The defendants were therefore properly entitled to the ruling that they were not bound in the law to cover or fence the machinery, and could not be made liable merely for neglect to do so."

What may or may not be perils incident to the service as usually carried on is a question to be determined by the particular circumstances of each case, and therefore it follows they cannot be defined. It depends upon the duties of, and degree of care exercised

of the master to fully observe his duty as such, when measured by the standard of duty required, and governed by the principles stated in the preceding chapters, for the very

by, the master. It is but seldom that proof may not be made, at least to the extent of making a conflict, that the business as carried on, or appliances furnished or used, are not of that ordinary character required by law. Thus it is that in most cases the question is made to depend largely upon the knowledge, actual or presumed, on the part of the servant, of the character of the appliances in use or of the master's methods. For this reason, and to avoid repetition, some notes that may be applicable to questions discussed in this chapter may be found appended to chapter 11, where the subject of increased or extraordinary risks is discussed.

#### **Obvious Defects—Bridges.**

We have seen in note to a former chapter that the courts are not agreed as to the duty of a railroad company in constructing or maintaining overhead bridges so low as to endanger the lives of employes operating trains. In Maryland and New Jersey it is held that there is no legal obligation on the part of a railroad company to build its bridges over public roads with an elevation so great that one of its employes standing on top of a car will not be endangered (*Baltimore & O. R. Co. v. Stricker*, 51 Md. 67; *Baylor v. Railroad Co.*, 40 N. J. Law, 23), while in most of the states it may or may not be negligence, according to the attending circumstances and conditions (*Rains v. Railway Co.*, 71 Mo. 164; *Wells v. Railway Co.*, 56 Iowa, 520, 9 N. W. 364; *Owen v. Railroad Co.*, 1 Lans. 108; *Riley v. Railroad Co.*, 135 Mass. 292; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 41, 16 N. E. 145, and 17 N. E. 584; *Carbine's Adm'r v. Railroad Co.*, 61 Vt. 348, 17 Atl. 401). The knowledge of the servant of the manner of construction of such bridges in respect to their elevation is the important element, which determines, not the question of the fault of the company, but the question of an assumption of the risk of such structures by the servant.

#### **Railroad Track.**

Where a sectionman continues in the service with knowledge of the general bad condition of the track, though he may not have

plain reason that he may not owe his servant such duty or to such a degree. Such standard is that which is required and must be observed in those cases where the serv-

known of the particular defect causing him injury, he assumes the risk thereof. *Green v. Cross*, 79 Tex. 130, 15 S. W. 220.

The same rule applies where defective condition of track is obvious, and plaintiff, a brakeman, had made several trips over the road. *O'Neal v. Railway Co.*, 132 Ind. 110, 31 N. E. 669.

Also, where a laborer employed by a railroad company in removing obstructions and repairing its track, known by him to be in a dilapidated condition by reason of unusual storms causing slides and washouts. *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497.

Also, where the danger caused by the presence of a log near the track (the employé working upon a train loaded with logs upon a private logging road) was known to such employé, or might, by the use of reasonable or ordinary care, have been known to him, knowledge will be presumed. *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321, 956.

Where a foreman went out on an engine for the purpose of cleaning the road from snow, and knew, or ought to have known, that the track was thus obstructed, the defendant did not owe him the same duty to furnish a reasonably safe track as it would had he been engaged in the operation of a train in the ordinary course of business. *Wellman v. Railway Co.*, 21 Or. 530, 28 Pac. 625.

#### **Frogs and Guard Rails.**

A brakeman who has been in the employ of a railroad company for six months must be presumed to have had knowledge of the fact that guard-rail openings and frogs were not blocked; that such openings were dangerous. *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. 340, and 19 N. W. 680.

Where a switchman had for a long time been employed in a railroad yard, and knew that a frog was unlocked, he assumes the risk thereof. *Appel v. Railway Co.*, 111 N. Y. 550, 19 N. E. 93.

Also, where a car coupler has been for some time employed in a railroad yard, but only three or four days in that part of the yard where injured by his foot being caught in an unblocked guard rail. *Ireland v. Gardner*, 54 Hun, 634, 7 N. Y. Supp. 609.

Also, where a brakeman has been more than a year in the employ of a railroad company, and some of the guard rails are not blocked

ant has no knowledge, actual or presumed, of the master's peculiar methods of business, the situation of his premises, the character of his machinery, or the fitness and com-

so as to prevent the employé's foot from being caught between the guard rail and main rail. *McNeill v. Railway Co.*, 71 Hun, 24, 24 N. Y. Supp. 616.

Also, where an experienced brakeman enters the service of a railroad knowing that its frogs are not blocked. *St. Louis, I. M. & S. Ry. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895; *Grand v. Railway Co.*, 83 Mich. 564, 47 N. W. 837.

Also, where the foreman or yardmaster, who had charge of the switching of cars and the making up of trains in the yard, was familiar with the situation of the tracks in the yard, and knew that a certain frog was not blocked. *Wilson v. Railway Co.*, 37 Minn. 326, 33 N. W. 908.

#### **Cars and Locomotives.**

Where duty of servant is to take out defective cars from trains for repairs, he has no right to assume that they are perfect. *Arnold v. Canal Co.*, 125 N. Y. 15, 25 N. E. 1064.

Where the servant has equal knowledge with the master of the defects existing, the servant will be deemed to have waived his right of action for damages arising from injuries resulting from such defects. The plaintiff in this case had been using the hand car for months. He was conclusively presumed to know as much of its condition as the foreman. The court say: "A recovery is only warranted when the negligence of the defendant appears. A waiver as to such negligence places the case in the same position as though no negligence on the part of the defendant had been shown." It was also held that it was the duty of the employe, having knowledge of the defect, to have called the attention of the master to it. Telling the foreman that the car was in bad shape is not sufficient. He should have pointed out with more particularity the defect. *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175. See, also, as to the last proposition, *Crutchfield v. Railway Co.*, 76 N. C. 320.

Where an engineer knows that the condition of the brake on his engine is such that it is useless, he assumes the risk therefrom. *Monaghan v. Railroad Co.*, 45 Hun, 113.

Where a hand car is too light, and it jumps the track, injuring an experienced employé, he assumes such risk. He is presumed to

petency of his agents or servants, or of the character of the employment in the situation in which his engagement of service places him. When he has no such knowledge, the servant has the right to assume—and such is impliedly a

have known of the character of the car and its attendant danger. *Gulf, C. & S. F. Ry. Co. v. Williams*, 72 Tex. 159, 12 S. W. 172.

Where a street-car driver knows of the defective condition of the platform where he stands, he assumes the risk. *Rogers v. Galveston City Ry. Co.*, 76 Tex. 502, 13 S. W. 540.

Where a servant knows that a car is unsafe to couple, and is broken, and is warned not to attempt to couple it, if he does so the risk is his own. *Barkdoll v. Railway Co.* (Pa. Sup.) 13 Atl. 82.

Where the servant knows that the step on an engine was dangerously high, and he had used it without giving notice to the master of its condition, he assumes the risk thereof. *New York, L. E. & W. R. Co. v. Lyons*, 119 Pa. St. 324, 13 Atl. 205.

Where the servant uses a hand car, the handle or walking beam of which is broken, he is held to assume all risk of injury resulting therefrom. *Powers v. Railway Co.*, 98 N. Y. 274.

### **Machinery.**

Where the employé has used the appliance furnished him for several years without complaint, he assumes the risk thereof. *Chicago, B. & Q. R. Co. v. Merckes*, 36 Ill. App. 195.

An employé who has worked three months on a machine takes the risk of patent defects. *United States Rolling-Stock Co. v. Chadwick*, 35 Ill. App. 474.

Where a servant operates a machine which he has used six weeks,—a sufficient time to have acquired a knowledge of its management,—and where the dangers of the machine are apparent, he cannot claim that the machine should be provided with guards. *Bond v. Smith* (City Ct. Brook.) 14 N. Y. Supp. 932.

Where machinery is not defective, and there is a difference of opinion between an employer and employé as to the safety of operating it in a given manner, and the employé, while contending it is unsafe, remains at work, he assumes the risk. *Weigrefe v. Daw*, 40 Ill. App. 53.

Where a belt by which power is applied to a planing machine became defective by the fastenings becoming insecure, so that the belt

part of his contract—that there are no dangers or hazards to which he will be exposed, save such as are ordinarily and naturally incident to the service which he is to perform.

Thus it is that the rule has been and is often stated to be

was liable to break apart, of which an employé had knowledge, and to which he had called the foreman's attention, but the latter had declined to repair it, and had told the employé to go on with the use of the machine, the employé assumes the risk. *Anderson v. H. C. Akeley Lumber Co.*, 47 Minn. 128, 49 N. W. 664.

Where an employé helps to construct a part of a machine, and runs the machine constantly thereafter for several years, he is chargeable with knowledge of defects in its construction. *Litchfield Car & Machine Co. v. Romine*, 39 Ill. App. 642.

Where a boy nearly 18 years old was employed to handle wood to be sawed on defendant's machine, the same being defective, of which he was aware, and he had on other occasions acted as sawyer, and, on the occasion when injured, was ordered by the superintendent to run a saw, where the machine was simple and easy to learn, he assumes the risk. *Michael v. Stanley*, 75 Md. 464, 23 Atl. 1004.

Also, where the defect in a machine was patent, which machine the servant had been using for three weeks, and neither party knew of the defect, and each had an equal opportunity for discovering it. *Rietman v. Stolte*, 120 Ind. 314, 22 N. E. 304.

Also, where plaintiff, a lad of 17, had worked six months on a similar machine, except that the roll and the cylinder were further apart, and the operation of the machine was simple, though he was not instructed of the danger of putting his hand between the roll and cylinder to smooth the cloth. *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 344.

This case is in conflict with *Chopin v. Badger Paper Co.*, 83 Wis. 195, 53 N. W. 452. The court in the former say: "In view of the plaintiff's age and experience prior to the time of the accident, no duty then rested upon the defendant to give him instruction in reference to the risk of possible injury. It could not be deemed necessary at that time to tell him that, if he should put his hand in between the cloth and the revolving cylinder just at or before the place where the cloth came in contact with the cylinder, there was



that the servant assumes the natural and ordinary risks incident to his employment. If there are any other or greater risks or hazards growing out of or attendant upon

danger that his hand would be caught. The omission to do this did not constitute negligence on the part of the defendant."

In the Wisconsin case the boy was 18 years of age, had been employed about machinery for a number of years, and had frequently oiled paper machines known as "single deckers." The machine causing him injury was a "double decker." It does not appear that the process of oiling the one was different from the other. It appeared that plaintiff knew the danger of his hand being caught between the wheels. The court make the distinction that though he knew if his hand came in contact with the wheels, it would cause him injury, yet that knowledge of the probable result of the insertion of the hand, and appreciation of the risk or possibility that his hand might be accidentally drawn between the wheels, are two entirely different things. The court refrains from stating what warning or information of danger the employer could have given him that he did not fully comprehend. He could only have told him to be cautious in oiling the machine. "Do not put your hands too close to the wheels; there is danger, if you do, of the cogs drawing your hand in between them and crushing it." All this the plaintiff fully comprehended. The distinction stated, it seems to me, has no foundation in fact.

The reasoning of the Massachusetts court is sustained in the case of *O'Keefe v. Thorn* (Pa. Sup.) 16 Atl. 737. The plaintiff was a boy 14 or 15 years old, and placed to work upon a tin-stamping machine. His duty was to shove the plates under the machine. He was injured the second day of his employment by his hand being caught under the machine. The court say: "All machinery is dangerous when not properly used. There was no danger in this particular machine that was not as obvious to a boy of 14 as to an adult. He could see that, if he placed his hand under the stamp, it would be crushed. If boys are not allowed to use machinery until they have become accustomed to its use, it would be difficult for them to learn any useful trade or occupation by which to earn a livelihood." A nonsuit was held proper.

In *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731, where the experience of the employé was not as great as of the lad in the

the method in which the particular business is carried on; if the premises or appliances are not reasonably safe, or the agents and servants fit and competent or sufficient in

Wisconsin case; and the apparent danger and knowledge thereof on the part of the employé were somewhat the same, the court very properly remark: "We do not see what the defendant could have told the plaintiff that he did not know before, if he possessed the ordinary intelligence of boys of fifteen." See, also, *Ciriack v. Woolen Co.*, 146 Mass. 182, 15 N. E. 579; *Probert v. Phipps*, 149 Mass. 258, 21 N. E. 370.

In *Prentiss v. Kent Manuf'g Co.*, 63 Mich. 478, 30 N. W. 109, a lad of 19 years old was injured by his hand coming in contact with a split saw, which he was using. He had been in defendant's employ for three years, was put on all kinds of machinery to run, had been employed in the room where the saw was located, and had worked at the saw for three or four days before his injury. The court say: "The record, I think, sufficiently shows that with the plaintiff's knowledge and experience in the use of machinery, and his three-days operation of this particular saw, he must be regarded as having acquired a knowledge of all the ordinary dangers accompanying its use."

In *Townsend v. Langles*, 41 Fed. 919, the servant was injured by his hand coming in contact with cogwheels in motion, which he was brushing off. The demurrer admitted the allegation that he was inexperienced, and had worked but a few days in connection with the machine; that the defendant had never told him, nor was he aware, of the danger. It was held the danger was apparent; that so far as open and visible causes of injury, incidental to the employment, are concerned, the employed, as between the employer and himself, tacitly agrees to run the risk,—citing *Tuttle v. Railway Co.*, 122 U. S. 195, 7 Sup. Ct. 1166. It was further held that the absence of covering upon and around cogwheels is not per se negligence on the part of the employer. To the same effect are the cases of *Schroeder v. Car Co.*, 56 Mich. 132, 22 N. W. 220; *Sanborn v. Railway Co.*, 35 Kan. 292, 10 Pac. 860; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396.

The conclusion of the court in the latter case is placed upon the familiar ground that when the servant assents to occupy the place prepared for him, and incur the dangers to which he will be ex-

number, or there are dangers connected with the business which the master ought to know,—then it is that unusual and extraordinary risks are present which are not im-

posed thereby, having sufficient intelligence and knowledge to comprehend them, it is not a question whether such place might with reasonable care, and by a reasonable expense, have been made more safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. He thus consents to such dangers attending the work as are apparent.

In *Schroeder v. Car Co.* the use of such machines without covering, being in common use, could not be held to be negligence; also, that the danger from their use was perfectly apparent; that the plaintiff understood the exposure to which he was subjected, and needed to observe only ordinary care to avoid it; also, if the machine lacked anything to make it as safe as it should have been, the plaintiff knew what was lacking, and voluntarily encountered the risks.

In *Way v. Railway Co.*, 40 Iowa, 341, the court lay down the following rule, or rather state it be the law: "The servant must make a reasonable use of his senses; and if a defect is apparent and patent, and would have been discovered by the exercise of reasonable and ordinary care, in view of the position which he occupies, the law conclusively presumes that he possesses the knowledge which reasonable attention would furnish. Any other rule would be opposed to, rather than promotive of, the interests of humanity, as it would encourage the grossest inattention, and would reward it the highest when it produced the profoundest ignorance." And in *Anderson v. Railway Co.*, 39 Minn. 523, 41 N. W. 104: "The servant is bound to exercise care on his part to avoid danger and accident, commensurate with the risks to which he is subjected in his employment; and such defects in an instrument which he is frequently using as are obvious to the senses, or with reasonable diligence ought to be discovered or known by him, he will be held to have assumed the danger of."

In *Shaw v. Sheldon*, 103 N. Y. 667, 9 N. E. 183, the deceased was employed in defendant's rolling mill. He stepped upon an iron tube in the vicinity of the rollers, which were uncovered, and slipped off. One foot and leg passed between the revolving coupling of the rolls, causing the injury of which he died. The court say: "The injured

pliedly assumed by the servant unless they are open and visible, or he has knowledge of them and of the danger, either actual or presumed. Thus it is that in most cases

employé entered upon the service, and remained in it, with a full knowledge and appreciation of the risk and danger resulting from having the couplings uncovered. The fact was entirely obvious; the result and peril plain at a glance; and the injured servant a skilled workman, a foreman of the rollers, accustomed to the machinery and the service, and having the capacity and the ability to fully appreciate the consequences of having the couplings uncovered. Within the rule applicable to such cases, the plaintiff's intestate took upon himself the risk of injury from the observed and obvious omission."

The opinion in the case of *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286, presents a very interesting and able discussion of the question, which is particularly valuable by reason of the fact that the injured employé was a girl, something over 14 years of age. She was working upon an ironing machine in a laundry, and injured by her hand being caught between the rollers. She was instructed how to do her work, but was not instructed as to the dangers of the employment. She worked the machine, however, safely, for six weeks. The court say: "If a person is so young that, even after full instructions, he wholly fails to understand them, and does not appreciate the danger arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at work at his own risk. Assuming that the plaintiff had no instructions as to the danger of the machine, and she had never worked on any machinery before, if, under such circumstances, this accident had happened within a short time of her employment, and because of her unfamiliarity with, and lack of appreciation of, the dangers attendant upon the working of the machine, the defendant may well have been liable for the damages sustained by her on account of such ignorance. She had not received any instructions as to its dangers from the defendant or his agents, but she had acquired the information in fact from the best of all teachers,—that of practical experience. She knew, therefore, all that the instructions of the defendant would have imported to her. This was enough. Being of an age to appreciate and have full knowledge of the danger, and at the same time being competent to perform the duty demanded from her, the fact that she was a minor does not alter the general

the real question to be determined is that of knowledge or want of knowledge, on the part of the servant, of the danger to him in the course of his employment,—whether

rule of law upon the subject of employé's taking upon themselves the risks which are patent and incident to the employment."

**Risks not Assumed—Machinery.**

In the case of *Neilon v. Paper Co.*, 75 Wis. 579, 44 N. W. 772, the facts were that a boy 14 years of age was injured while attempting to oil gearings while in motion; his hand being caught therein. He had no experience with machinery. It was conceded that attempting to do such an act was highly dangerous while the gears were in motion. The court held it was not clear that the plaintiff comprehended the danger attendant upon the work he was directed to do, and therefore it was a proper question for the jury.

In *Philadelphia & R. R. Co. v. Huber*, 128 Pa. St. 63, 18 Atl. 334, where the defect in the brake could be easily seen on looking at it, but it was not shown that the injured servant had ever seen it before, and where he had but two or three minutes in which to determine whether to use it, during which time he was engaged in uncoupling cars, directing their movements, etc., and the brake would stand a moderate strain, but not a severe one, such conditions do not necessarily charge the servant with the risk of injury from the use of such defective brake.

In *Barbo v. Bassett*, 35 Minn. 485, 20 N. W. 198, the cogs by which the plaintiff's hand was injured were uncovered, without his knowledge, and he had not noticed the change. It was held to be a fair question for the jury, upon the evidence, whether, considering the nature of plaintiff's duties and occupation in the mill in respect to the location of the machinery in question, the change might not have escaped his observation without negligence on his part. In *Sherman v. Railway Co.*, 34 Minn. 259, 25 N. W. 593, the company, some time prior to his being killed, had adopted to some extent a device for blocking frogs. Subsequently some of these blocks were displaced, and it was held a proper question for the jury whether the instances were sufficient in number to indicate a change of rule in respect to such protection. It was further said: "Nor was it to be presumed, under the circumstances, as matter of law, that, because the condition of the frog in question was open to view, the

he knew, or ought reasonably to have known, such danger.

The determination of what the servant ought to know, necessarily involves an inquiry as to his duties in the

deceased, in the exercise of reasonable diligence, ought to have known the danger, and hence should be deemed to have assumed the risk."

In *Craver v. Christian*, 31 N. W. 457, 36 Minn. 413, where a covering of glass had been removed, it was held that, under the peculiar circumstances and the evidence, it was not so clear that, in the exercise of ordinary prudence, the employé must necessarily have seen, or ought have known, the condition of the machinery, and risks to which he was exposed, as to have warranted the court in determining, as matter of law, that he assumed such risks.

#### Structures.

When one enters upon a service, he assumes to understand it, and takes all the ordinary risks that are incidental to the employment; and when the employment presents special features of danger, such as are plain and obvious, he also assumes the risk of those. *Foley v. Electric Light Co.*, 54 N. J. Law, 411, 24 Atl. 487. This case, by the reasoning of the learned court, clearly makes the distinction between the assumption of the risks of an obvious defect from knowledge thereof, and the exception to the rule, sometimes applied, (more often misapplied), that where the servant has knowledge of the defect, yet he may continue in the service, unless the danger was so imminent therefrom that a prudent person, having regard to his own safety, would have declined so to do. The court say: "Obvious dangers which the servant enters upon voluntarily are impliedly assumed by him, if he continues in the service. If the servant knows of the defect, and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff was justified in concluding that he could ascend the pole, and return, with safety, by using extra care, the defendant had the right to draw the same conclusion; and in that event the defendant was in no fault. If the peril was of that imminent character that it was imprudent on the part of the plaintiff to attempt to ascend the pole, then, under the rule laid down by the trial court, the verdict was wrong. If the plaintiff acted as a prudent man in undertaking

premises, which are implied by the contract of service. These duties are manifold and various, and at this time can be only stated in a general way.

It is the duty of the servant, on entering upon his service,

to ascend the pole, the injury must be ascribed to mere accident,—the casual slipping of the foot. In that case neither he nor his employer is to be held guilty of a want of ordinary care. The servant and the master had equal means of forming a correct judgment. Therefore, whatever want of prudence in taking the risk is chargeable to the one must be imputed to the other. The attempt to engraft this exception upon the general rule introduced the element of the absence or presence of due prudence on the part of the servant into this discussion, which is a circumstance, in my judgment, wholly foreign to it. The immunity of the master rests upon the contract of hiring, and not upon the absence or presence of negligence in either party. The master says to the servant: 'You understand fully the nature of the employment, and the danger attending it. Will you enter upon it?' The servant says: 'I accept it;' and the law implies that he accepts it with all the risk incident to it, without regard to the magnitude of the danger. The question is not whether it was prudent on his part to encounter the peril. In contemplation of law, his undertaking to assume the apparent risk of the work was general and unqualified. He might have restricted his assumption of danger by stipulating that he would take upon himself such liability to injury only as could be avoided by ordinary care on his part. In the absence of such a term in the engagement, it cannot be introduced by implication without changing its import, and importing into it a condition unfavorable to the master, and which has not his consent. The cases rigidly hold the doctrine that the servant takes upon himself such definite and determinate risks as are obvious, and no action will lie against the master for injuries to the servant in such cases."

There are cases which seem to hold the exception, but upon examination it will be found that other considerations were present, which were of influence in producing the conclusion of the court. Among such may be mentioned *Hawley v. Railway Co.*, 82 N. Y. 370, and *Patterson v. Railway Co.*, 76 Pa. St. 389. We have had occasion to remark that the latter case was exceptional in other

to ascertain what he is expected to do, and the dangers directly connected therewith.<sup>2</sup>

As stated by a learned court: "It is the duty of the servant to exercise care to avoid injuries to himself. He

particulars. The Missouri court makes the exception a rule. *Devlin v. Railway Co.*, 87 Mo. 545.

It cannot be gainsaid for a moment that such an exception cannot exist, for the very reason that it necessarily destroys the rule. Where the parties have equal knowledge, one cannot be said to be more negligent than the other; nor can it be said that the master is responsible for an injury that may flow to his servant from a defect which the servant fully understands, unless it is held to proceed upon the assumption that in such case the master becomes an insurer of the servant against injury. The servant calculates his chances. He knows there is risk. He is a free moral agent. The only consideration is with him: "Shall I assume it?" If he does, it enters into the contract; and all considerations, such as that he must assume it or refrain from the service, or that it is assumed from the fact of service implying a command from the master, are entirely foreign to the question. The master owes him no greater obligation than others he may employ. He may find another willing to assume such a risk; and no rule should be applied that would compel the master to so change his business, or methods of carrying it on, that absolute safety to his employes, having knowledge, shall be guarantied. In effect, such a rule would, as has often been said by learned courts, effectually stamp out many of the prominent enterprises of the land. A case can hardly be conceived where the exception, if maintained, would not apply. It could have been applied with equal consistency in *Laning v. Railway Co.*, 49 N. Y. 521; *Gibson v. Railway Co.*, 63 N. Y. 449, where the defect was a projecting roof; in *Odell v. Railway Co.*, 120 N. Y. 325, 24 N. E. 478, where plaintiff was engaged in the operation of sawing machines; in *Powers v. Railway Co.*, 98 N. Y. 274, where a sectionman was using a defective hand car; as well as in the numerous cases where it has been held, if the servant remained in the employ, know-

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<sup>2</sup> *Swoboda v. Ward*, 40 Mich. 424; *Illick v. Railroad Co.*, 67 Mich. 637, 35 N. W. 708.



is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers

ing of defects and dangers, without complaint, or where complaint is made, but no promise of repair, he voluntarily assumes the risk.

In *Clark v. Railway Co.*, 28 Minn. 128, 9 N. W. 581, it was said: "It is well settled in the courts of this country and England that if a servant chooses to enter into an employment involving danger of personal injury, which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence of which was known to him when he entered the service, and which he had no reason to expect would be obviated or removed. If a servant accepts service with a knowledge of the position of structures from which he has occasion to apprehend danger, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in the case of injury."

In *Platt v. Railway Co.*, 84 Iowa, 694, 51 N. W. 254, the facts were somewhat similar to those present in *Gibson v. Railway Co.*, 63 N. Y. 449, as follows: While defendant's loaded car was being pushed by hand to a point from which to unload it, plaintiff, who was employed by the consignee, was directed by defendant's agent to set the brake, and, hastily mounting the ladder, was caught between the car and the projecting roof of the freight-house platform, and was injured. It appeared from his testimony that he knew the roof projected, and that the car was higher and wider than ordinary freight cars, and could readily have seen and avoided the danger by a single look. It was held he was properly nonsuited. The court say: "Whatever the relations of the parties were, it was clearly the duty of the plaintiff to exercise care in going upon the car. He must not go heedlessly and blindly to his work when there is danger."

In *Rains v. Railway Co.*, 71 Mo. 164. it was held that where the defendant had erected a dangerous structure, obvious to the senses, long before the accident, it was not liable to an employé receiving injury therefrom; that it was immaterial whether the structure could have been differently constructed.

In *Davis v. Railway Co.*, 21 S. C. 93, it was held not negligence on

which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere.”<sup>3</sup>

When he is a learner, and engages to work in a hazardous

the part of the company to erect or maintain dangerously near its track a water tank, even though closer than was necessary. The question of plaintiff's knowledge was not discussed, but evidently the court assumed he was chargeable with knowledge of it.

In *Ryan v. Canada Southern Ry. Co.*, 10 Ont. 745, a brakeman was injured by contact with a switch stand located close to the track. Cameron, C. J., says: “The switch stand was in its nature a permanent structure. It was part of the works of the railway when the plaintiff entered into defendant's service, and he took the risk of the employment. The stand was not dangerous per se. It was a passive force in causing the injury to the deceased,—an injury that could not have happened if the deceased had not placed himself in the position to be injured thereby. The risk a person assumes on entering an employment in which there is an apparent source of danger is put by Erle, J., in *Seymour v. Maddox*, 16 Q. B. 332, thus: ‘A person must make his own choice whether he will accept employment on premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light.’” Rose, J., concurring, says: “The company was not guilty of any wrong in putting the standard in this position. For all that appeared, it was for the best interest of the company to have it exactly where it was.” If, instead of the standard, a wall of a building had been erected so close to the line that there was no more space than here, would it appear reasonable to hold the employer liable for dangers from a similar accident? If a bridge on a railway were constructed with raised sides affording so little space that a train could barely pass through, and a brakeman, whose place of duty was on the platform or top of the car, should thoughtlessly place himself between the train and sides of the bridge, and be injured, would an action lie?

In *Missouri Pac. Ry. Co. v. Somers*, 71 Tex. 700, 9 S. W. 741, a

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<sup>3</sup> *Wormell v. Railroad Co.*, 79 Me. 405, 10 Atl. 49.

branch of the service, he must improve every opportunity furnished by the master to learn of his duties and their accompanying danger. If he fails, he is guilty of neglect.<sup>4</sup> He must use reasonable care in examining his surround-

brakeman was injured by contact with a cattle guard near the track. He was not a new hand, and all the cattle guards were about the same distance from the track. The court held he was presumed to have known of the position of this structure, and assumed its risks, although he did not know of the proximity of the one in question. The court say: "But when he is aware that a large number of cattle guards are dangerous, and in this regard they are all substantially alike, so far as his knowledge extends, he must know better than to rely upon the safety of any of them, and must be held to have assumed the risk incident to their general condition."

In *Brossman v. Railway Co.*, 113 Pa. St. 400, 6 Atl. 226, a brakeman was injured by contact with a low bridge. From having passed under the bridge many times, he was held to have knowledge of its dangerous character. The doctrine is stated that, where an employé, after having an opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. The court say that the negligence of the employer is waived by the employé's remaining in the employment; that this waiver cannot be affected by the rapidity or promptness with which he may be required to act at the time of the accident. I think the court falls into a common error when it says that the negligence of the defendant is waived. It is a question of contract; a risk assumed as much as if expressly written in the contract.

The Iowa court, in *Wells v. Railway Co.*, 56 Iowa, 520, 9 N. W. 364, fell into the same error when it stated: "The doctrine is that negligence of the defendant in furnishing defective or improperly constructed machinery and implements is waived by remaining in the employment without protest and promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent; and without negligence of the defendant there can be no recovery. This waiver cannot be affected by the particular situation in which the

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<sup>4</sup> *Hathaway v. Railroad Co.*, 51 Mich. 259, 16 N. W. 634.

ings,<sup>5</sup> to observe and take such knowledge of dangers as can be attained by observation.<sup>6</sup> In performing the duties of his place, he is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself

employé may be placed, or the rapidity or promptness with which he may be required to act at the time of the accident. These questions may very properly bear upon the question of contributory negligence of the employé, but can have no bearing upon the question whether the defendant has been guilty of negligence about which the employé has a legal right to complain."

The error of the court, I claim, is in placing the knowledge of the employé upon the ground of waiver; it should have been placed upon the ground of contract. It being of the contract, the conduct or acts of the employé could not withdraw it from the contract without the consent of the defendant; so that neither the heedlessness, thoughtlessness, nor haste of the employé in performing his duties could affect the liability of the master or the terms of the contract. The court, therefore, rightly conclude that these questions may bear upon the question of contributory negligence after the negligence of the defendant has been established, but that negligence of the defendant cannot be established, where the servant has knowledge of the defect suggesting the danger, by the mere fact or circumstance that the employé was required to act in haste, or that he was heedless or thoughtless.

There are some cases other than those cited in the text which it may be said do not approve of the position taken by the courts in the foregoing cases. In *Scanlon v. Railway Co.*, 147 Mass. 484, 18 N. E. 200, the facts were that the distance between a signal post by the side of a railroad and a ladder on the outside of a car was one foot. A brakeman on his first trip did not know that there were erections so near, and was not informed of the danger. They were, in fact, exceptional. It was held that the danger was not obviously

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<sup>5</sup> *Batterson v. Railway Co.*, 53 Mich. 127, 18 N. W. 584.

<sup>6</sup> *Illick v. Railroad Co.*, 67 Mich. 639, 35 N. W. 708; *Morton v. Railroad Co.*, 81 Mich. 435, 46 N. W. 111; *Lake Shore & M. S. Ry. Co. v. O'Conner*, 115 Ill. 254, 3 N. E. 501; *Chicago, B. & Q. Ry. Co. v. Avery*, 8 Ill. App. 133.

accordingly. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes;<sup>7</sup> and if the defect

incident to his employment. This court had decided in *Lovejoy v. Railway Co.*, 125 Mass. 79, that, where an engineer had worked on the road for some time, he was presumed to have knowledge of their proximity to the track, and danger therefrom, and they were a risk assumed. It could not be said in *Scanlon v. Railway Co.* that the plaintiff was charged with such knowledge; therefore the risk could not be said, as matter of law, to have been assumed.

In *Nugent v. Railway Co.*, 80 Me. 62, 12 Atl. 797, the employé had not been afforded a reasonable opportunity for discovering and becoming familiar with the awning to a station house, with which he came in contact while climbing the ladder of a car, causing him his injury. Therefore the question of knowledge on the part of the employé was not in the case, and the contract relation was not made to appear. The court held that due care on the part of the defendant required enough space between the car and the awning for reasonable action of body, arms, and legs of the brakeman whose duty required him to ascend the ladder there. The court mention the fact that he was injured while engaged in the prompt performance of a call to duty, but it is nowhere intimated that, if the plaintiff had been charged with knowledge of the danger, such a circumstance would have affected the question of the master's negligence or liability. True, the court cite the language of the court in *Snow v. Railway Co.*, 8 Allen, 441, where importance is attached to such conditions. What was said in that case must be considered as overruled by the case of *Lovejoy v. Railway Co.*, supra.

In *Allen v. Railway Co.*, 57 Iowa, 623, 11 N. W. 614, it was held that the construction and maintenance by a railway company of a cattle chute dangerously near the track was negligence; that its own convenience was not the standard of its duty. Yet the question of the defendant's knowledge was not discussed by the court.

The case of *Chicago & I. R. Co. v. Russell*, 91 Ill. 299, is to the effect that leaving for months a telegraph pole near the track is negligence. Yet the court say, in that case, that there is no evidence

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<sup>7</sup> *Walsh v. Railroad Co.*, 27 Minn. 367, 8 N. W. 145.

is obvious, and suggestive of danger, knowledge on the part of the servant will be presumed,<sup>8</sup> as well as when the dangers are the subject of common knowledge.<sup>9</sup>

that the deceased knew anything of this pole, or that he was ever required before to assist in switching cars off from this track.

In *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, the brakeman was injured by coming in contact with an awning projecting over the track. The company were held to be negligent in this respect; and the court say there was no reason for supposing that the plaintiff had acquired knowledge of the unsafe condition of this awning before his injury, as he had been but two months upon the road, and, except upon two trips, had always passed this station in the night.

In *Pidcock v. Railway Co.*, 5 Utah, 612, 19 Pac. 191, the plaintiff was injured by contact with a switch stand within 10 inches of the car. Its location so close to the track was held to be negligence. It did not appear that the plaintiff, though he knew generally there was a switch stand there, had had sufficient opportunity to learn it was dangerously near. There were considerations which might have led him to believe it was not nearer than four feet.

It will be observed that in none of these cases, with the possible exception of the last, was knowledge on the part of the servant of the defect, or the opportunity for knowledge, made to appear, and that none of them sustains the extreme position of the Wisconsin court in *Dorsey v. Construction Co.*, or the Minnesota court in *Johnson v. Railway Co.*, 43 Minn. 53, 44 N. W. 884, holding, in effect, that the servant must have actual knowledge, not only of the existence of the structure dangerously near the track, but of its exact distance therefrom, to charge him with an assumption of the risk.

#### **Methods of Work—Familiarity with.**

The principle stated is applicable to the methods of the master in operating his machinery or carrying on his work.

In *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. 1079, the deceased,

<sup>8</sup> *Wedgewood v. Railway Co.*, 41 Wis. 478.

<sup>9</sup> *Smith v. Car Works*, 60 Mich. 506, 27 N. W. 662; *Fort Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Melzer v. Car Co.*, 76 Mich. 101, 42 N. W. 1078; *Fisher v. Railway Co.*, 77 Mich. 546, 43 N. W. 926; *Stephenson v. Duncan*, 73 Wis. 405, 41 N. W. 337.

The duty of the master, in such case, is not to see that the servant actually knows. He has a right to rest upon the probability that anybody would know what was generally to be seen by his own observation.<sup>10</sup> So that in build-

at the time of the accident, and for about a year previous, was employed as a fireman upon switch engine No. 13 in defendant's railroad yard. As he was crossing one of the tracks therein, he was run over and killed by engine No. 49, also employed in the yard. It was claimed that the engine, at the time, was being driven at a negligently high rate of speed, or considerably more than six miles an hour, contrary to the provisions of Rev. St. Wis. § 1809. The defendants offered to prove that such was the universal custom in that yard, and that the deceased well knew of it. The court say: "It is said, in support of the ruling, that such a custom would be unlawful, and that proof of a constant violation of law cannot be available as a defense. This is undoubtedly true. \* \* \* But it was not the bare fact that engines habitually ran faster than six miles per hour, which the defense offered to show; they offered to prove that the deceased well knew this fact. Now, while the custom of running switch engines at an illegal or dangerous rate of speed is no defense, it is quite apparent that, if the deceased knew that the engines in the yard constantly were operated at such a rate of speed, and chose without objection to remain in his employment, it was entirely competent to prove the two facts, as bearing on the extent of the risk which the deceased voluntarily assumed. \* \* \* It is not proof of an illegal custom as a defense, but proof that an employé knew of the habitual use of his employer's machinery in a particular and dangerous way, and remained in the service without objection. The custom does not affect the right of action, but the knowing acquiescence therein may do so."

The case of *Bengtson v. Railway Co.*, 47 Minn. 486, 50 N. W. 531, presented facts somewhat similar to those involved in the Wisconsin case. The court say: "It may be doubted whether the ordinance was intended to be operative, or could be sustained as operative,

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<sup>10</sup> *Batterson v. Railway Co.*, 53 Mich. 127, 18 N. W. 584; *Michigan Cent. R. Co. v. Austin*, 40 Mich. 247; *Illick v. Railroad Co.*, 67 Mich. 639, 35 N. W. 708.

ing his structures or conducting his business the master has the right to assume that the servant will exercise, in their use, ordinary care, and not unnecessarily expose himself to hazards not necessary or usual in his employment. The

within the yard of a railroad company upon its own private property, within or over which the general public has no right of passage as it has along or over a public street.' The court further state that if it be conceded that such method is negligence on the part of the master, "yet if such method was the defendant's mode of transacting its business, and the risks to which it subjected him were known to deceased while in its employment, he assumed the risks." There were piles of logs lying near the track, which impeded plaintiff in his attempt to escape from the threatened danger. The court state that permitting the logs to remain there was negligence. Yet the plaintiff knew they were there, also the peril to which he was subjected by their presence, and therefore assumed the risk. To the point that such knowledge might be excused upon the ground that he might, in the hurry and confusion, have forgotten the danger therefrom, the court say that was one of the risks assumed. It would probably be different where the necessity for immediate action, and the consequent natural confusion of mind, were brought about by some negligent act of the defendant, the risk of which he had not assumed; as, if the signal he had a right to rely on had not been given, or the engine approached at a greater rate of speed than he had reason to anticipate.

In *Hughes v. Railway Co.*, 27 Minn. 137, 6 N. W. 553, the court state the following as a correct rule of law: "If an employer's unsafe and careless custom of doing business is open to observation, so that it can readily be observed by the senses, and the employé has ample and reasonable means of using his senses for the purpose of observing the custom, is his own fault and negligence if he does not observe it, and he stands upon the same footing as if he had actual knowledge of the custom referred to; so that the risk to him, from such custom, is his own, and not that of the employer. This is the same thing as saying that an employé must make reasonable use of his senses to avoid danger and injury in the course of his employment, or, in other words, that he must not be negligent, and is a correct rule of law." The alleged negligent act was the dumping



master's duty is met when he constructs and maintains his appliances in such manner that they are reasonably safe when prudently used. The degree of care on the part of the servant required to be exercised is such care, prudence, and caution as prudent men under similar circumstances would ordinarily exercise.<sup>11</sup> Negligence in a servant may, and often does, consist in failing to know, as well

of ashes from engines upon the track, and leaving them there for a short time, until the sectionmen could remove them.

In *Larson v. Railway Co.*, 43 Minn. 423, 45 N. W. 722, the court say: "It may be taken as settled that it was the duty of the defendant to inform its sectionmen, unless they had already been advised of the fact, of its practice to run irregular trains without special notice to them. But it is also to be considered that if any one in such employment had in any other manner learned of this practice, or if, in the exercise of common intelligence and prudence in his employment, he ought to have learned it, it would be presumed he had acquired such knowledge and assumed that risk; or else, if he had not learned this fact, that he had been guilty of such negligence on his own part as should preclude a recovery." In that case, while plaintiff testified he did not have actual knowledge, it was held his experience was sufficient to charge him therewith. See, also, *Jolly v. Railway Co.*, 93 Mich. 370, 53 N. W. 526; *Olson v. Railway Co.*, 38 Minn. 117, 35 N. W. 866.

In *Fordyce v. Lowman*, 57 Ark. 160, 20 S. W. 1090, it was held that where a servant, upon entering the employment, knew that it was the custom to push cars ahead of the engine, he assumed the risk of such method.

In *Whitmore v. Railway Co.*, 150 Mass. 477, 23 N. E. 220, it was held that a car repairer assumed the risk, knowing that a newly-loaded car is liable to be kicked against the cars behind him, and thus push the cars upon him.

In *Jackson v. Railway Co.*, 104 Mo. 448, 16 S. W. 413, it was held that where an experienced brakeman knows of the custom of the defendant to carry cars loaded with timber and iron rails extending over ends of cars, and it is shown that they are liable to slip back and forth, he assumes the risk from cars loaded in such manner.

<sup>11</sup> *Northern Pac. R. Co. v. Herbert*, 116 U. S. 656, 6 Sup. Ct. 590.

as failing to do; and such is always the case when it is his duty to inform himself and know.<sup>12</sup>

A workman who has charge of or uses implements or appliances in the performance of his work is required by law to exercise proper watchfulness, in order to preserve them in a condition which will render them fit for the purposes to which they are devoted; and if they are exposed to wear or destruction from use, he must see that repairs are made; or if he may restore them to a fit condition for use, he must do it himself. If such repairs may not be made by him, he must make report of the fact to his employer, or other person having charge of the repairs of the article, tool, or appliance. The interest of the employer demands the recognition of this rule; and surely this duty rests with greater weight upon the employé when personal danger to himself or others follows from the use of the appliances when out of repair. The instinct of self-preservation and of humanity not only reveals the duty, but prompts to its faithful discharge. This most beneficent rule extends to all affairs of life wherein the relation of employer and employé exists, and enforces alike the protection of property and life.<sup>13</sup> So, when the servant uses machinery known to be defective, he is bound to use special precautions; and if he fails to do so, and is injured, he cannot charge the master with liability.<sup>14</sup> And when the work could have been done easily by a safer mode, but the servant, because it was more convenient, voluntarily chose a perilous one, he cannot recover.<sup>15</sup>

The servant's duty, in all cases, is to use care to avoid

<sup>12</sup> *Hewitt v. Railroad Co.*, 67 Mich. 62, 34 N. W. 659.

<sup>13</sup> *Stroble v. Railway Co.*, 70 Iowa, 558, 31 N. W. 63.

<sup>14</sup> *Lake Shore & M. S. R. Co. v. Roy*, 5 Ill. App. 82.

<sup>15</sup> *St. Louis Bolt & Iron Co. v. Brennan*, 20 Ill. App. 555; *Same v. Burke*, 12 Ill. App. 369.

danger and accident, commensurate with the risk to which he is subjected; and defects in tools or instruments which he is frequently using, and which are obvious, or which he may discover by reasonable diligence, he will be charged with knowledge of.<sup>16</sup> But he does not take upon himself risks incident to the use of unsafe machinery by continuing to use it, without objection, after knowledge of its defective character or condition, unless he also understood, or by the exercise of ordinary observation ought to have understood, the risks to which he was exposed by its use.<sup>17</sup> And the same rule applies with equal force to the master, who is not liable to his servant for injuries caused by known defects, unless they were such as, by the exercise of reasonable skill, he might have known to be dangerous. He is not liable as an insurer.<sup>18</sup>

Where a fireman was employed in the operation of an engine which was regularly run backward, it was held that, as he was employed to perform a particular thing, as to the dangers of which he must be presumed to have had full knowledge, he could not complain that the act was dangerous;<sup>19</sup> the rule being that the servant assumes the hazards of dangerous methods, as well as the use of defective tools or machinery, when, after employment, he learns of the defects, but voluntarily continues in the employment without objection.<sup>20</sup>

<sup>16</sup> *Anderson v. Railroad Co.*, 39 Minn. 523, 41 N. W. 104.

<sup>17</sup> *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147; *Cook v. Railway Co.*, 34 Minn. 45, 24 N. W. 311; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551.

<sup>18</sup> *Morris v. Gleason*, 1 Ill. App. 510.

<sup>19</sup> *Kuhns v. Railway Co.*, 70 Iowa, 561, 31 N. W. 868.

<sup>20</sup> *Camp Point Manuf'g Co. v. Ballou*, 71 Ill. 417; *Toledo, etc., Ry. Co. v. Eddy*, 72 Ill. 138; *Chicago, etc., Ry. Co. v. Munroe*, 85 Ill. 25; *Richardson v. Cooper*, 88 Ill. 270; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

The common practice of railroad companies of coupling two engines together, tender to tender, for the purpose of removing snow from the track, being well known to all employes, and one which locomotive engineers are frequently called upon to engage in, the dangers incident to such use of engines must be held to have been assumed by an engineer as an ordinary risk.<sup>21</sup> The same when it is the established practice to run extra or irregular trains at any time without notice to agents or sectionmen;<sup>22</sup> also when an employé at work in a yard knows that it is a custom to run engines in a yard at a greater speed than allowed by law, and he continues in the employ.<sup>23</sup> So, when a foreman or yardmaster, who has charge of switching cars and making up of trains in a yard, is familiar with the tracks, and knows a certain frog is not blocked or filled, and is unsafe or dangerous;<sup>24</sup> the general rule being that an employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had an opportunity to ascertain.<sup>25</sup>

The supreme court of Missouri state the rule to be "that the servant assumes the dangers from causes open to observation by him, and which it required no special training or skill to foresee were likely to occasion him harm, even though at the time of injury he was in the performance of

<sup>21</sup> *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358.

<sup>22</sup> *Olson v. Railway Co.*, 38 Minn. 117, 35 N. W. 866; *Larson v. Railway Co.*, 43 Minn. 423, 45 N. W. 722.

<sup>23</sup> *Bengtson v. Railway Co.*, 47 Minn. 486, 50 N. W. 531; *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. 1079.

<sup>24</sup> *Wilson v. Railway Co.*, 37 Minn. 326, 33 N. W. 908.

<sup>25</sup> *Norfolk & W. Ry. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. 340, and 19 N. W. 680; *McGlynn v. Brodie*, 31 Cal. 378.

duties which he did not contract to render;"<sup>26</sup> and the supreme court of Michigan, "that the employé assumes all the risks and perils usually incident to the employment, and that included in such risks and perils are those which it is a part of his duty to take knowledge of by observation."<sup>27</sup>

The foregoing are but different ways of expressing the same doctrine, which is uniform and general in all courts. Great difficulty, however, as we shall see, arises in the application of it to particular facts and cases, creating not alone confusion, but establishing precedents directly in conflict with each other, frequently upon the same conceded facts and circumstances.

Some courts make a distinction, and have laid down an exception which itself has become a rule: "That while the servant may have known of the defect, or it was so open, visible, and obvious that, if he had used his senses, he would have known of it, yet he may not have known the precise danger connected with it; and whether he did or did not know, or ought to have known, is left to the jury to determine." There are many cases, as we shall see, where the application of the exception stated was most proper; yet there is a tendency, perhaps, to carry it beyond proper limits, and to cases of well-known danger, where the defect itself suggests the only danger, and that is apparent. In considering the rule stated, it is essential to a proper understanding of what ought to be its application in a given case to consider the character of the defect, as to its being obvious, the suggestion or appreciation of danger which the defect presents, and the duty of informing the servant as to the danger, and warning him against it.

<sup>26</sup> *Cummings v. Collins*, 61 Mo. 523.

<sup>27</sup> *Illick v. Railway Co.*, 67 Mich. 638, 35 N. W. 708.

The latter element has been referred to in a preceding chapter.<sup>28</sup> Other exceptions to the rule than the one stated have grown out of it by judicial interference or construction, as the case may be, which must be considered, and of which we shall treat in subsequent pages. One is often characterized as unnecessarily dangerous methods, premises, or appliances, and the other as diverted attention.

By reason of the confusion and conflict stated, I am compelled to quote largely from the opinion of courts of last resort, that the reader may have the benefit of their reasoning in making application of the rule, and as justifying the result which followed. This is all the more important, as herein is found the occasion for a large proportion of the cases brought in our courts.

In *Dorsey v. Construction Co.*<sup>29</sup> the rule was stated that the knowledge on the part of the servant should be of the precise danger to him from an obvious defect, in order to hold him to an assumption of the risk. The facts in that case were that the conductor of a freight train was injured while climbing up the ladder of a freight car, by coming in contact with a cattle chute erected near the track,—dangerously near, as the court say. The proof showed that he had been employed for some months upon that part of the road; passed the chute during the term of his employment almost daily; knew the cattle chute was there; and knew the exact location, with reference to the track, of two other chutes, similarly located, at adjacent stations. Yet the court stated "that while he may have known generally of the proximity of the chute in question to the track, yet necessarily it did not follow that he knew its precise distance therefrom, and consequently not its precise danger."

<sup>28</sup> Chapter 7.

<sup>29</sup> 42 Wis. 596.

In *Johnson v. St. Paul, M. & M. Ry. Co.*<sup>30</sup> the injury to the servant was caused by his coming in contact with a signal post erected in defendant's yard, and situate about four feet from the track. At the time he received the injury he was climbing up the ladder of a box car. He had been employed as switchman in such yard for two weeks or more, passing this post many times each day. The court say: "We are not prepared to say that he knew, or should have known, if he used ordinary prudence, the danger of such an accident. While he must have known of the existence and location of this post, he may not have known from mere observation, or unless his attention had in some way specially been called to it (situated, as it was, in the center, between the tracks), that it was near enough to the cars to be dangerous, but might be misled, unless he had made actual measurement or calculation."

In *Sweet v. Railroad Co.*<sup>31</sup> the injured servant was one of a crew of switchmen in the company's yard at Detroit, and his duties extended to all parts of the yard. His injuries were caused by coming in contact with a large shed of the defendant located in said yard, near the side tracks, while he was ascending or descending a ladder upon one of defendant's cars which was being moved on such track. The shed had been there for five years; and the intestate, who had formerly been a brakeman, had been employed as a switchman in that yard for a month or six weeks. There was no direct evidence that he was ever on that siding before the accident, or that his attention had been called to the dangerous proximity of the building, but there was evidence that cars were probably shipped in there once or twice a day. This case was decided upon the somewhat peculiar ground that it was not his duty to inform himself of

<sup>30</sup> 43 Minn. 53, 44 N. W. 884.

<sup>31</sup> 87 Mich. 559, 49 N. W. 559.

the danger to be apprehended from the defect until he had some reason to apprehend danger from it; that until then he might be influenced by the assumption that the master had regard for his duty, and would not negligently expose him to extraordinary peril.

Was the rule applied in either of the foregoing cases? Rather, was it not evaded, or, more correctly speaking, was it not misapplied? Did not the injured employé in each of them have an abundant opportunity to ascertain the exact location of the structures with which he came in contact? It required no special skill or training to foresee that they were likely to occasion him harm. It was a part of the duty of the servants thus engaged to obtain a knowledge of such risks and dangers. We have seen, ante, that he must take ordinary care to learn the dangers which are likely to beset him in the service; that he must not go blindly at his work, when there is danger; that he must inform himself; that such is the law everywhere;<sup>22</sup> that he must use reasonable care in examining his surroundings;<sup>23</sup> that knowledge on his part will be presumed, if the defect is obvious.<sup>24</sup>

It cannot be questioned for a moment that these cases were not decided in accordance with the rule stated, but rather from a special rule, arbitrarily applied by the court, and so applied by ignoring the contract relations between the parties, and ignoring the rights of the master as a party to that contract. We have seen that the duty of the master in such case is not to see that the servant actually knows. He has a right to rest upon the probability that anybody would know what was generally to be seen by his

<sup>22</sup> *Wormell v. Railroad Co.*, 79 Me. 405, 10 Atl. 49.

<sup>23</sup> *Batterson v. Railway Co.*, 53 Mich. 127, 18 N. W. 584.

<sup>24</sup> *Wedgewood v. Railway Co.*, 41 Wis. 478.



own observation.<sup>35</sup> And to assume for a moment that a switchman employed in a yard for weeks did not know the location of a building or of a post in plain sight, and which he passed many times a day; that he did not know its danger, simply because he may not have measured its distance from a track, when the only reasonable presumption is that he did not look at the time, or failed to remember,—is to disregard every reasonable inference. The master had a right to expect, when he placed so conspicuous an object before his servants, that they would observe it; would learn, would know, its precise danger to them. And if he had such right to so assume, he could not be held to the duty of specially informing each employé that he had 100 or more signal posts, 100 or more cattle chutes, 100 or more buildings of different sizes and of variable distances from his tracks (either main or side tracks), and specify to each such employé the exact distance in feet or inches each one was from the track. Such warning would be useless. No employé would pretend to remember the information as to each. His observation is a more perfect, safe, and certain means of information, and his own sense of duty and danger more suggestive of observation, than all the verbal or printed information the master could give him.

The older members of the Wisconsin bar have not forgotten how keenly the late Chief Justice Dixon felt the final result of *Dorsey v. Construction Co.*; and it may safely be said that neither the result nor the logic of that case has been acceptable to the bar of Wisconsin. The better reasoning, and that within the rule, is found in the following cases:

<sup>35</sup> *Batterson v. Railway Co.*, 53 Mich. 127, 18 N. W. 584, and cases cited ante.

In *Lovejoy v. Boston & L. R. Co.*<sup>36</sup> the facts were that an engineer was injured by coming in contact with a signal post located close to the track, and while he was leaning out of his cab watching for signals from the conductor. The court stated that the company had the right to construct its road with structures close to the track. As between the plaintiff and defendant, it was maintained that it would have been more prudent to have placed the signal posts, abutments, bridges, and other structures, so necessary upon its road, more distant from the track. If there was any danger to the plaintiff while in the performance of his duty from the structures thus placed, it was a risk he assumed. He knew the manner in which the road was constructed, the proximity to the track of those structures, and the methods employed in the management of trains.

In *Gibson v. Railway Co.*,<sup>37</sup> where a conductor was injured by coming in contact with the projecting roof of a depot building, the court say: "When the deceased entered the employment of the defendant, he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and property of the defendant, as it then was, so far as such risks were apparent. Accepting service with a knowledge of the character and position of the structures from which the employes might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, nor, in case of injury from risks which were apparent, could he call upon his employer for indemnity."

In *De Forest v. Jewett*<sup>38</sup> the doctrine as well as the language quoted in *Gibson v. Railway Co.* was approved. In that case a yardman, who was injured, claimed negli-

<sup>36</sup> 125 Mass. 82.<sup>37</sup> 63 N. Y. 452.<sup>38</sup> 88 N. Y. 264.

gence in this: that there were small sluices or ditches in the yard, into one of which he fell. The court say: "He had been employed as switchman and car coupler in the yard for nearly two years. It appears that every one of these sluices or ditches were known to him. He knew their location, and, so far as could be determined by seeing them daily, he knew their width and depth, and the manner of their construction. Whatever there was of danger to one engaged in coupling cars in this yard must have been apparent and obvious to him. This is not a case of latent and secret danger, unknown to the servant, but which should have been known to the master. We do not see how the defendant can be held liable in this case without abolishing the well-established rule that the servant, by accepting the employment, assumes the risks and perils thereof, so far as they are apparent and obvious."

In *Tuttle v. Detroit, G. H. & M. Ry. Co.*,<sup>39</sup> where the alleged cause of the injury was the sharpness of the curves of the side track, the court remarked that such a question should never be left to a jury. "The perils were seen and known. They were not like the defects in unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in proper working order. Every thing was open and visible, and the deceased had only to use his senses and his faculties to avoid the danger to which he was exposed. One of these dangers was that of the drawbars slipping and passing each other when the cars were brought together. It was his duty to look out for this, and avoid it. This danger must have been known to him. It will be presumed, as an experienced brakeman, he did know it; for it is one of those things which happen in the course of his employment, under such conditions as existed here."

<sup>39</sup> 122 U. S. 195, 7 Sup. Ct. 1106.

In *Randall v. Baltimore & O. Ry. Co.*,<sup>40</sup> where a brakeman was injured by the alleged negligence of the company in placing a switch stand too near the tracks, the court say: "A railroad yard where trains are made up, necessarily has a great number of tracks and switches close to one another; and any one who enters the service of a railroad corporation, connected with the moving of trains, assumes the risk of that condition of things."

*Stephenson v. Duncan*<sup>41</sup> was where a saw projected out into a narrow passageway in a mill, and an employé was injured in moving through the passage by coming in contact with the saw. The court, after stating the general rule as to the master's duty in regard to the safety of his appliances and premises, proceed to say: "This is undoubtedly the general rule; but it cannot apply here, for the reason that the plaintiff must be presumed to have entered upon the employment with the full knowledge of existing defects. Therefore, he assumed the risk. The fact that the saw was not covered, that the passageway was narrow and dangerous, would be seen at a glance. It occurs to the writer that the court might in this case have said, as they said in the case of *Dorsey v. Construction Co.*, that the employé might have observed that the passageway was narrow, but might not have known just how narrow, and, therefore, did not appreciate the precise danger."

Many other cases might be cited where the language justifies the criticism herein made, but the foregoing are sufficient to sustain the preference made, and the position here taken.<sup>42</sup>

This confusion and conflict in the decisions is embarrassing. Their tendency is to produce uncertainty in the ad-

<sup>40</sup> 109 U. S. 478, 3 Sup. Ct. 322.

<sup>41</sup> 73 Wis. 406, 41 N. W. 337.

<sup>42</sup> See notes to chapter 10.

ministration of the law. As before stated, I can but conclude that the latter cases are best supported by legal principles; certainly, there is in them a more correct application of those principles. The relations of the parties rest in contract, express or implied, imposing mutual obligations, regulated by legal principles and presumptions.

First. The master may conduct his business in his own way, though such method may be more than ordinarily hazardous, thereby increasing the risks and peril.

Second. The servant assumes the risk of the extra hazards and perils by continuing in the employment, where he has knowledge of the master's methods, either actual or presumed.

Third. Those extra hazards which thus become known to the employé enter into and become a part of the contract.

Fourth. Where the defect is obvious, knowledge is presumed, on the part of such employé, of the dangers which it suggests, and which are apparent.

Fifth. The master may rest upon the assumption that the servant knows what is generally to be seen, by his observation, suggesting the danger.

Sixth. The servant must exercise ordinary care to learn the dangers which he may have to encounter.

These considerations control the general rule of the master's duty to furnish a reasonably safe place to work, and reasonably safe appliances for the performance of the work, and qualify the legal presumption, "that the servant may assume that this duty on the part of the master has been performed," to the extent that he may not thus assume, where he knows, or ought to know, that such duty has not been done, and was not contemplated in making the contract of service.

The contract, therefore, must be that risks and perils obvious to a person of ordinary understanding are em-

braced therein, and assumed by the servant, when the opportunity has existed for observation. Where there are no peculiar dangers, knowledge of the defect is knowledge of the danger. The danger of contact with a post or structure while on a moving train is a matter of common knowledge. As to such defects the servant cannot be heard to say that while they were apparent and obvious, yet he did not know or ascertain their precise location, or realize their apparent danger. Knowing them to exist, it is his duty to ascertain their precise location with reference to the performance of his duties. When the location is ascertained, the danger is manifest; it being the law and the contract that the servant ought to know that which was plain to be seen, and which it was a part of his duty to learn and know. How, then, can it be said that the jury are to determine whether or not he had knowledge?

## CHAPTER X.

### ASSUMED RISKS (Continued)—KNOWLEDGE OF DEFECT— APPRECIATION OF DANGER.

**Mere knowledge of the defect is not always sufficient to charge the servant with an assumption of the risk, p. 184.**

**To have such an effect, such knowledge must convey to a mind like his the danger that may or is likely to result from the defect, p. 184.**

**The question is, did the servant know, or ought he to have known in the exercise of ordinary prudence, that the risks, and not merely the defects, existed? p. 185.**

**The rule is extended further: Though the servant may have knowledge of the defect, and the danger therefrom, yet, if his duties do not ordinarily bring him within its scope, he may not be held to have assumed the risk, p. 186.**

**Though he have such knowledge, yet, where a reasonably prudent employe would not suppose he was within the range or reach of any result flowing from such defect, he is not chargeable with an assumption of the risk, p. 186.**

**Dangers not appreciated from obvious defects, ordinarily include such as are not suggested by the defect or act itself, p. 186.**

**Accepting or continuing in the service with knowledge of the character of the structures used is an assumption of the risk of injury therefrom, p. 187.**

**Risks not obvious, assumed by the employe, are such as exist after the master has used due care to guard the servant against danger, p. 187.**

**What familiarity may constitute an opportunity for observation is ordinarily a question of fact; sometimes a question of law, p. 188.**

**Much depends upon the nature and character of the servant's employment, and to what extent his duties otherwise engage his attention, p. 188.**

**Some courts make an exception to the rule,—that where the attention of the servant is diverted by his duties, and the defect is unnecessarily dangerous, his knowledge of the defect and danger will not charge him with the assumption of the risk, p. 189.**

**The exception is not based upon any principle applicable to the subject, p. 190.**

**Other courts do not accept this exception as well founded. They contend it ignores the contract; that attention to duty and attention to avoid dangers are the very matters the obligations of the contract impose upon the servant, p. 190.**

**The decision in *Nadau v. White River Lumber Co.* discussed and criticised, p. 190.**

**The question is not whether the servant knew of the defects and dangers, but whether the master had a right to assume he would know, p. 191.**

**Even in the case of a minor, the question is whether the danger was such that the servant could not**



be presumed to know of it, and whether the master failed to inform him, p. 191.

There is a wide distinction between the doctrine of assumption of risk and contributory negligence, pp. 193-197.

Risks assumed are embraced in the contract,—become a part of it, p. 198.

Conduct of the servant relates only to risks and perils not assumed, p. 198.

Risks assumed cannot be made to depend upon the conduct of the servant after the risk has been assumed, p. 198.

“Equal knowledge” is but a phrase, p. 198.

It is stated “that where both parties have equal knowledge, and the servant continues in the service, each party takes the risk,” p. 198.

The doctrine as applied to car couplings and bumpers, p. 199.

The doctrine applied in some states to the manner in which cars are loaded, p. 202.

Other courts refuse to apply it to such loading of cars, p. 203.

The doctrine also applied in some states to the manner of construction of foreign cars, p. 204.

The doctrine also applied to domestic cars of different make used upon the same road, p. 205.

Mere knowledge of the defect or method will not always be sufficient to charge the servant with an assumption of the risk thereof. Such knowledge must convey to a mind like his the danger that may or is likely to result to him in his employment from the defect or negligent act. As

was said in *Cook v. Railway Co.*:<sup>1</sup> "It is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defects. The mere fact that the servant knows the defects may not charge him with contributory negligence, or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed?" This rule is consistent with the general rule relating to the conduct of persons, in determining the character of an act,—as to its being negligent or otherwise; that is, the servant ought, from his knowledge of the defect, reasonably to have foreseen that it might cause him injury. In all the various phases of the law of negligence, this is the predominating and essential element to be established. It is the controlling test in the application of the rule of proximate cause.

Minors are only held to assume such risks when their capacity is such that they may be able to foresee that harm may come to them from the defect. To the adult without experience or skill the same test is applied. If, therefore, servants having a proper or ordinary prudence could not reasonably foresee from their situation and exposure, or reasonably anticipate, that danger might come to them by reason of the defect, then the servant may continue his employment without being chargeable with the consequences which may flow to him from the defect, and without being held to have waived the negligence of the master or assumed the risk.

In *Russell v. Railway Co.*<sup>2</sup> this exception was applied

<sup>1</sup> 34 Minn. 45, 24 N. W. 312.

<sup>2</sup> 32 Minn. 233, 20 N. W. 147.

to the case of a brakeman coupling cars,—one having a Miller platform; the other, one in common use. The servant observed the condition of the cars in this respect; yet the court say he may not have understood that, upon the curve where they were being coupled, there was danger of the drawbars passing each other. In other words, he knew of the defect, but did not fully appreciate the danger.

The rule is extended somewhat further. Even though the servant may know of the defect, and of the danger therefrom,—that is, the manner in which injury may come,—yet, if his duties do not ordinarily bring him within its scope, the fact that at the time of injury he happened to be in a position to receive injury does not necessarily charge him with responsibility for the consequences, or relieve the master from liability; and even if his place of work was so far distant that a reasonably prudent employé would not reasonably expect he was within the range or reach of any result flowing from such defect, yet, the fact being that the result did reach him there, it cannot be held that he is chargeable with a knowledge of the risks and dangers accompanying the defect.<sup>3</sup>

Ordinarily dangers from obvious defects not appreciated include such danger as is not suggested to the servant, or one similarly situated, by the defect or act itself,—dangers not apparent from the defect itself, such as an explosion likely to follow from molten metal coming in contact with snow or water, as was the case of *Smith v. Car-Works*;<sup>4</sup> or poisoning from making Paris green, as in the case of *Fox v. Peninsular White Lead & Color Works*;<sup>5</sup> or from want of braces to girders in constructing an elevated road,

<sup>3</sup> *Sanborn v. Madera Flume & Trading Co.*, 70 Cal. 261, 11 Pac. 710.

<sup>4</sup> 60 Mich. 506, 27 N. W. 662.

<sup>5</sup> 84 Mich. 676, 48 N. W. 203.

as in the case of *Davidson v. Cornell*.<sup>6</sup> The reasoning of the last case fairly illustrates the principle, it having been decided upon the distinct ground that it might have required some skill or judgment not available to a common observer, or to the plaintiff, to realize the importance of the lack of such bracing. It was said by the court: "The general rule is that a servant, entering into employment which is hazardous, assumes the usual risks of the service; and when he accepts or continues in the service, with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. Those not obvious, assumed by the employé, are such perils as exist after the master has used due care and precaution to guard the former against danger. The defective condition of structures and appliances which, by the exercise of reasonable care on the part of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation."

The case of *Gates v. State*<sup>7</sup> further illustrates the application of the principle. There a laborer who had been engaged upon one of the state scows upon a canal was placed by the foreman of the scow to work upon a defective bridge, to repair it, and while so engaged the bridge, from its general unsoundness, fell, and plaintiff was thus injured. The court say: "While, in work of an inherently dangerous nature, the workman is ordinarily held to assume that certain risk which must attend upon its execution, that rule involves, and must depend for its application, upon the means of knowledge, upon the workman's part, of the attendant peril to him. Such knowledge may be pre-

<sup>6</sup> 132 N. Y. 234, 30 N. E. 573.

<sup>7</sup> 128 N. Y. 222, 28 N. E. 373.

sumed to be possessed by reason of previous employment and experience, or to be suggested by ordinary observation and appearances. If the workman is without experience in the particular work required of him, and if, as here, danger for him exists from causes not apparent, but which are known to his employer, I think it unquestionable in principle that an obligation should be deemed to rest upon him (the latter) to communicate such information as would apprise the workman of the nature of the work, and of the possible risks of its execution. He should be placed on a par, as nearly as possible, in such respects, with his employer."

It must not be assumed that in all cases where injury is occasioned by means of an obvious defect, where the risk of such defect is not one assumed by the servant, that the law presumes the master has knowledge thereof, and is consequently liable for the consequences thereof. We have discussed the question of the master's duty in the first instance, as well as his duty in respect to repairs, including his duty as to inspection; yet cases arise where his appliances become defective, and, though the duty of inspection has been met, the defect has not been discovered. The law may or may not presume knowledge from the circumstances; and one of the most important of these is the length of time the defect has existed. It may have been so recent as not to have given a sufficient opportunity to have discovered it, even by the exercise of great diligence. No precise rule can be laid down by which it can be said, as matter of law, what length of time presumes knowledge.<sup>8</sup>

What familiarity may or may not constitute an opportunity for observation, within the rule, on the part of the

<sup>8</sup> *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918; *Behm v. Armour*, 58 Wis. 1, 15 N. W. 806; *Radmann v. Railway Co.*, 78 Wis. 26, 47 N. W. 97; *Strahlendorf v. Rosenthal*, 30 Wis. 675.

servant, may be a question of law, or one of fact for the jury, depending upon the particular facts and circumstances. There are some defects that are so obvious that a glance is sufficient to charge the servant with knowledge. Such was the case in *Stephenson v. Duncan*,<sup>9</sup> where a saw projected into a narrow passageway in a mill; also, in *Sweet v. Coal Co.*,<sup>10</sup> where the steps leading to defendant's dock were placed at irregular distances, and were without a railing; and also in *McGlynn v. Brodie*,<sup>11</sup> where the servant worked upon or near a defective cupola of a furnace; while, as to others, it may be that more familiarity with the existing conditions would be required before any presumption would arise that defects had been observed. Much depends upon the nature and character of the servant's employment, and to what extent his duties otherwise engage his attention. No precise rule can be laid down. We have seen, ante, that long familiarity with the general condition of the premises, or use of them, was held to constitute such an opportunity for observation and knowledge that knowledge was presumed, while in other cases such long familiarity was held not to be conclusive as to such opportunity. The notes present additional instances.

Some courts have been inclined to make an exception to the general rule, to the effect that though the defect may be obvious, and also opportunity may have existed to have given him knowledge, and, in some cases, though he may have had actual knowledge, yet, when his duties were such as to cause him to divert his attention from the defect and its danger, and the defect was unnecessarily dangerous, the master may not be relieved from responsibility for the consequences to such servant that are caused by

<sup>9</sup> 73 Wis. 404, 41 N. W. 337.

<sup>10</sup> 78 Wis. 127, 47 N. W. 182.

<sup>11</sup> 31 Cal. 378.

such defect.<sup>12</sup> Other courts do not accept this exception as well founded, and contend that the exception ignores the contract; that attention to duty and attention to avoid dangers are the very matters the obligations of the contract impose upon the servant; and that, of all the risks assumed, such are the most important, and for which the wages paid are to be deemed the equivalent.<sup>13</sup> And it must be conceded that the latter view is the most reasonable, and best supported by principle.

The recent case of *Nadau v. White River Lumber Co.*<sup>14</sup> involved the questions of youth and inexperience, yet not to such an extent that it could be said they would justify the conclusion arrived at by the court. The decision of the court in that case has received more than ordinary prominence, on account of the advance position taken upon the question under consideration. The servant was 19 years of age, and conceded to have been inexperienced in the operation of machinery. His injury was caused by coming in contact with dangerous gearing, located close to his place of work. It was perfectly visible, and it was just as true in this case as it was in *Stephenson v. Duncan* that the danger to be apprehended could be seen at a glance. It was just as apparent to an inexperienced person as to one possessed of experience, and just as likely to be observed by a person 19 years of age as one of 40 years. The lad worked close to such gearing for five days, when he was injured by coming in contact with it. The jury believed his statement that he was not apprised of the existence of such gearing until the time of the injury.

<sup>12</sup> *Nadau v. White River Lumber Co.*, 76 Wis. 130, 43 N. W. 1135; *Kane v. Railway Co.*, 128 U. S. 94, 9 Sup. Ct. 16; *Dorsey v. Construction Co.*, 42 Wis. 583.

<sup>13</sup> *Baltimore & O. R. Co. v. Stricker*. 51 Md. 70.

<sup>14</sup> 76 Wis. 130, 43 N. W. 1135.

Conceding this to be true, yet such fact would not justify a recovery, for the very plain reason that he ought to have known of it; the opportunity being present to have seen it, and its character being such that he would have seen it had he but used his senses. The master was justified in a belief that he would see it, and seeing it conveyed to him all the danger to be apprehended from it. The statement of the law applicable to the case by the court is not accurate, when they say: "The employé is only presumed to assume the dangers usually attendant upon his employment; and, when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is entitled to recover, unless it be shown that he knew of such unreasonable and unusual danger, and fully comprehended its nature, at the time of his employment or before the accident happened." The question, in such cases, is not, as stated by the court, whether in fact the servant did know. The true question is, had the master a right to assume, from the obvious nature of the defect, that the servant would know what in fact was plain to be seen? Whether the servant did or did not sooner discover the defect could not change the responsibility of the master, for the plain reason that it was as much within the contract, or, as sometimes said, as much a risk assumed, as though the servant had actual knowledge of the gearing, which of itself was knowledge of the danger. The fact that the boy was a minor would not change the rule, as there was not, and could not be, any pretense but that he was of suitable age and of sufficient intelligence to comprehend all the danger there was to be apprehended.

This decision is in conflict with the cases decided in other courts, as relates merely to the statement of the law; the more correct rule being that stated by the court in



*Pratt v. Prouty*:<sup>15</sup> "To show negligence in the master, even in the case of a minor, it must appear that the danger was such that the servant would not be presumed to know it, and that the master did not give him information of it."

The learned court of Wisconsin, it seems to me, fell into a great error when they assumed that it was a question of the burden of proof; that it was for the defendant to show that he did have actual knowledge of the existence of the gearing. It is true, they cite, to sustain their views, the strong language of Chief Justice Ryan in *Dorsey v. Construction Co.*: "That the consequences of acquiescence ought to rest upon positive knowledge of the precise danger assumed; not on vague surmise of the possibility of danger." Yet such statement in that case can hardly be said to outweigh the great number of cases in other states that do not accept it. It was not a question of proof at all. As has been said, it was whether the master had the right to assume he would know it, from its character, being plainly visible.<sup>16</sup> The rule laid down by the Wisconsin court would make it necessary for the master to prove affirmatively that his servant had actual knowledge of every conspicuous structure, bridge, or building on its line of road, and would disregard in almost every case the doctrine of assumed risks as applied to obvious defects.

The court, however, later in the opinion, seem to have given some consideration to the question whether the attention of the servant might not have been so engrossed by his duties as to make it reasonable that he may not in fact have discovered the dangerous gearing. In this view,

<sup>15</sup> 153 Mass. 334, 26 N. E. 1002.

<sup>16</sup> *Batterson v. Railway Co.*, 53 Mich. 127, 18 N. W. 584; *Michigan Cent. R. Co. v. Austin*, 40 Mich. 247; *Illick v. Railway Co.*, 67 Mich. 639, 35 N. W. 708.

if the circumstances ought to warrant it, the position of the court, as before stated, finds support in some other cases.

A recent case in the United States supreme court<sup>17</sup> goes further to support the exception than any case in the books. This was the case of an adult who was injured while letting himself down from a car, having forgotten that one of the steps was missing. The decision of the court, singularly enough, fails to observe any other consideration as being involved than that of contributory negligence. They say: "We are of the opinion the court erred in not submitting to the jury to determine whether the plaintiff, in forgetting or in not recalling at the precise moment the fact that the car from which he attempted to let himself down was one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery." The learned court must have also forgotten that there was a principle which they had often applied in other cases (for instance, *Randall v. Railroad Co.*),<sup>18</sup> designated "assumed risks," which grows out of the contract relation, to the effect that there is a well-recognized distinction between risks assumed and contributory negligence.

The doctrine of *Kane v. Railway Co.* is that a servant only assumes risks and perils of which he has knowledge; that he remembers at the precise moment of the accident. What he forgets, or what an ordinarily prudent person similarly situated might forget, is not assumed. If this

<sup>17</sup> *Kane v. Railway Co.*, 128 U. S. 94, 9 Sup. Ct. 16.

<sup>18</sup> 100 U. S. 478, 3 Sup. Ct. 322.

doctrine was generally followed, it is very evident that but few risks would be determined to have been assumed. If an engineer has orders to meet a special train at a certain point, and, while engaged in his duties, his attention is so diverted that he forgets his orders, and a collision ensues, by which he is injured, by the same reasoning he could be heard to say, "While I knew, yet I did not remember;" therefore the master is liable for ordering him to meet the train at such point; that it was unnecessarily dangerous to send out a special train to run upon orders.

In *Baltimore & O. R. Co. v. Stricker*<sup>19</sup> the court say: "In the midst of preoccupation with his duties, he might be excusable for losing sight of the danger menacing him at the moment. But this peril is one incident to the employment, in contemplation at the time of the contract, and arising from causes open and obvious, the dangerous character of which he had an opportunity to ascertain, and the risk of which is assumed."<sup>20</sup>

In *Townsend v. Langles*,<sup>21</sup> where the facts were very similar to those in *Nadau v. White River Lumber Co.*, it was held that the employé, though inexperienced, could not recover. In *Wallace v. Central Vt. R. Co.*,<sup>22</sup> where a brakeman, in performance of his duty to watch cars in his rear, to see that they did not break loose upon a reverse curve, came in contact with a low bridge, it was held that the fact that he had forgotten the bridge did not relieve him from the consequences, in the absence of circumstances producing hurry, excitement, or confusion. And

<sup>19</sup> 51 Md. 70.

<sup>20</sup> *Wells v. Railway Co.*, 56 Iowa, 525, 9 N. W. 364; *Brossman v. Railway Co.*, 113 Pa. St. 490, 6 Atl. 226; *Bengtson v. Railway Co.*, 47 Minn. 486, 50 N. W. 531.

<sup>21</sup> 41 Fed. 919.

<sup>22</sup> 63 Hun, 632, 18 N. Y. Supp. 280.

in *Haley v. Jump River Lumber Co.*<sup>23</sup> the supreme court of Wisconsin applied the general rule, and held that where the servant (with far less opportunity to discover the defect—a log near the track—than had the servant in *Nadau v. White River Lumber Co.*) might, by the use of reasonable or ordinary care, have learned of the danger, he will be presumed to have known of it. The general rule was stated to be, and applied, in *Davidson v. Southern Pac. Co.*,<sup>24</sup> as in the case last cited.

The case of *Hannah v. Connecticut River R. Co.*<sup>25</sup> is an authority for the exception stated. In that case, although the plaintiff knew of the defect in the switch rod, and, while uncoupling cars, stepped between it and a tie, and was thus injured, such knowledge was not conclusive against his right to recover, when it also appeared that he stepped into the hole while attending to his duty, his attention being attracted to his work, which required rapid action.

The supreme court of Wisconsin seems to recognize the principle as absolute that it is the duty of a railroad company to see that its tracks are not so obstructed as to render the duties of its employes unnecessarily hazardous. Such was held in *Kelleher v. Railway Co.*<sup>26</sup> The questions of obvious defects, assumed risks, knowledge of the master's methods, etc., were not considered or discussed. The only other question considered was that of contributory negligence,—whether an ordinarily prudent person would have acted as did the plaintiff under the circumstances. The facts were: A switchman was upon the platform of a car which was being switched on the side track. Water was running from a steam pipe at the end of a car, and to avoid it he leaned outward from the steps, and was struck by the shed,

<sup>23</sup> 81 Wis. 412, 51 N. W. 321, 956.    <sup>25</sup> 154 Mass. 529, 28 N. E. 682.

<sup>24</sup> 44 Fed. 480.

<sup>26</sup> 80 Wis. 584, 50 N. W. 942.

which was  $22\frac{1}{2}$  inches from the side of the car. His duties required him to be upon the platform, and at times to lean out. He had worked in the yard as switchman nearly or quite a year. The court seem to find sufficient on which to base its conclusions in what was said in *Dorsey v. Construction Co.*<sup>27</sup> I hardly think that the assumption of the learned court as to the principal question, first above stated, finds any support in well-considered cases, and can hardly believe that the court intended to establish any such rule; but, rather, that there were other considerations, not expressed, but of controlling weight, connected with the principal question.

In the case of *Stackman v. Railway Co.*<sup>28</sup> the court seem again to recognize the principle stated in *Kelleher v. Railway Co.*, ante, but consider, in connection therewith the question of plaintiff's knowledge of the defect and danger. The case of *Bessex v. Railway Co.*<sup>\*</sup> is cited to sustain their conclusion. In that case the question of assumed risk was also ignored, and the conduct of the plaintiff considered upon the ground of contributory negligence. The danger and difficulty in such cases is that the jury are left to determine whether the employé, having knowledge, yet was acting prudently, and in the exercise of ordinary care; which would permit them to ignore the question of knowledge of the defect and danger entirely. These cases find support in *Kane v. Railway Co.*, ante, but are not in harmony with the doctrine as recognized generally in other states, and as applied in many cases in Wisconsin. As stated before, and as we shall now consider, there is a wide distinction between the doctrine of risks assumed and that of contributory negligence.

<sup>27</sup> 42 Wis. 583.

<sup>28</sup> 80 Wis. 430, 50 N. W. 404.

<sup>\*</sup> 45 Wis. 477.

In *Louisville & N. R. Co. v. Orr*<sup>29</sup> the question arises upon a paragraph of the defendant's answer which charged knowledge of the defects in the machine used, which the complaint alleged caused the plaintiff's injury. The court say: "It avers an affirmative defense, proof of which is not admissible under a general denial. The facts averred show that appellee assumed the risk incident to the use of the defective machinery. This assumption did not constitute contributory negligence, but amounted to an affirmative defense, precisely as an express agreement to assume such risks would have done. The use of defective machinery, under such circumstances as amount to an assumption of the risk, may impose additional care in its use; but the nature of the defense is affirmative in its character, as the assumption of the risk will exonerate the master from liability, though the servant was himself free from negligence."

This must follow from the very nature of the doctrine of assumed risks; otherwise, it would be practically abolished as an element of the contract. I have never seen it stated that the servant only assumed such risks, from obvious, known defects, as he might avoid by the exercise of ordinary care, or that he only assumed such risks as were liable to produce injury when he was not in the exercise of ordinary care, but, rather, that the rule was universal that, while the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge; and if, with such information, he uses the implement or continues in the service, he does so at his own risk as to injuries from such known defects. Whether or not he was in the exercise of ordinary care when he received his injury from such known

<sup>29</sup> 84 Ind. 50.

defect must be immaterial. It can only become material after it has failed to appear that he had knowledge of the defect or danger from it. The master has the right to assume the servant has knowledge of the character and location of structures which he is familiar with, and had an opportunity to ascertain; and their character may be such, with reference to the employment and experience of the servant, as to excuse the master from giving him warning; and, if so, how can the question of contributory negligence arise? Contributory negligence depends entirely upon negligence by another. Negligence arises only out of failure of duty. No warning is required where a defect is known, and danger therefrom appreciated. It is not a failure of duty on the part of the master to expose a servant to risks and dangers which the servant fully comprehends and appreciates, and which he willingly assumes. A risk assumed is one which was or becomes embraced in the contract. It cannot be made to depend upon the conduct of the servant after it has been assumed. Conduct of the servant only relates to risks and perils not assumed, where the negligence of the master exists or is assumed, causing injury, and then it is to be ascertained whether such conduct was a want of ordinary care. And thus arises the question of contributory negligence.

This discussion suggests another rule or principle,—that of equal knowledge. I cannot affirm that any new principle is involved, but simply that what sometimes is termed a “principle” is but a phrase expressing other principles heretofore discussed. It is stated to be “that where both parties have equal knowledge, and the servant continues in the service, each party takes the risk.”<sup>80</sup>

<sup>80</sup> *Indianapolis & C. R. Co. v. Love*, 10 Ind. 556; *Skipp v. Eastern Counties R. Co.*, 9 Exch. 223; *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 250.

This expression is often applied; yet ordinarily, when it is shown that the servant had knowledge, either actual or presumed, the risk is assumed, and therefore whether the master had knowledge, or ought to have had, becomes immaterial. This rule or expression is more often applied in the states where the master's duty does not extend to personal supervision of the details, or actual performance of the work, so as to make him responsible for the negligent performance of it by a workman or servant who directly represents him. The doctrine, if it may be so classed, is very forcibly illustrated by Orton, J., in *Kelly v. Abbot*.<sup>31</sup> Were the logic of this opinion—so clear and practically sound—of more universal application, much of the

<sup>31</sup> 63 Wis. 309, 23 N. W. 890.

#### Bumpers.

The question is often presented as to whether the danger from the use of cars with couplings of unequal height is a risk assumed by the employé.

It was said in *Whitwam v. Railway Co.*, 58 Wis. 408, 17 N. W. 124, that the law did not exact of the railroad company that its cars should be patterned after the same model, and that it was not negligence on its part to furnish for use an engine with drawbars too short to permit coupling with a car also furnished for use.

In *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133, it was held that the company was not negligent in furnishing an old mail car for use with drawheads lower than the cars to which it was to be connected. The court say: "The car which was the cause of the injury in this case was not in itself dangerous or unfit for use. In coupling it with other cars, peculiar caution was requisite, making it more liable to cause injury than would be a car of more modern construction. Its use, therefore, made it more dangerous than it otherwise would be. To hold that such act of furnishing such a car was negligence would be to hold that the employer is under obligation to his servants, under all circumstances, to make use of the safest known appliances and instruments, and is responsible for any failure to discard what is not such, and to supply its place with something



confusion now so apparent in a similar class of cases would be obviated. The injury complained of was caused by couplings of cars being of uneven height. The court say: "The difference in the elevation of the coupling irons of this foreign car and the caboose of other cars of defend-

safer. Any doctrine so far-reaching as this would manifestly be destructive of the general rule, and would almost make the employer the guarantor of his servant's safety in his employ."

To the same effect are: *St. Louis, I. M. & S. Ry. Co. v. Higgins*, 44 Ark. 293; *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112; *Same v. Ashbury*, 84 Ill. 429; *Brewer v. Railway Co.*, 56 Mich. 620, 23 N. W. 440; *Williams v. Railway Co.*, 43 Iowa, 396; *Muldowney v. Railway Co.*, 36 Iowa, 462; *Indianapolis, B. & W. Ry. Co. v. Flanigan*, 77 Ill. 365; *Hulett v. Railway Co.*, 67 Mo. 239.

In other cases the reasoning of the foregoing is not approved, and a contrary doctrine is stated. *Toledo, W. & W. Ry. Co. v. Fredericks*, 71 Ill. 294; *Crutchfield v. Railway Co.*, 78 N. C. 300; *Le Clair v. Railway Co.*, 20 Minn. 9 (Gil. 1); *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147.

Other cases hold that the knowledge of the employé, either actual or presumed, is controlling as to whether it is a risk assumed or not. *Lawless v. Railway Co.*, 136 Mass. 1; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Gibson v. Railway Co.*, 46 Mo. 163; *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147; *McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373; *Welch v. Railroad Co.*, 63 Hun, 625, 17 N. Y. Supp. 342.

Much greater care is required in using double deadwoods than the ordinary coupling apparatus; but the mere use of them does not constitute negligence. *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365. A railroad company may be liable to an inexperienced minor injured while coupling them. *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594. Where a servant, however, has been in the habit of coupling cars with double deadwoods to others without this appliance, it was held that he assumed risks therefrom. *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112; *Wormell v. Railway Co.*, 79 Me. 397, 10 Atl. 49. It being an obvious defect, the servant is presumed to have knowledge of it. *Hathaway v. Railway Co.*, 51 Mich. 253, 16 N. W. 634. It is not negligence on

ant's road would not have been very easily or readily observed when they were distant from each other; and yet the company is sought to be held liable for its want of ordinary care in not knowing the difference when taking the car into its train. When the car and caboose were

the part of a railroad company to fail to inform its servants of the fact that a foreign car received by it is equipped with such a device. *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791.

If the coupling apparatus is defective by reason of being out of repair, and injury ensues therefrom, the company is liable, provided it has had time to correct the defect after notice thereof. *Lake Erie & W. Ry. Co. v. Everett (Ind.)* 11 Am. & Eng. R. Cas. 221; *Belair v. Railroad Co.*, 43 Iowa, 602.

A brakeman who has been in the service 18 months is chargeable with knowledge that the stock cars of the company have no bumpers, and he assumes the risk. *Houston & T. C. Ry. Co. v. Barrager (Tex. Sup.)* 14 S. W. 242.

Also, where there is a visible defect in a locomotive on which a switchman in a yard is at work, consisting of a drawhead so short as to leave too small a space between the locomotive and a car to be coupled for the switchman to work in safety. *Brooks v. Railway Co.*, 47 Fed. 687; *Bennett v. Railway Co.*, 2 N. D. 112, 49 N. W. 408.

Also, where couplings are mismatched upon cars owned by the company, and a brakeman has continued in the employ of the company where such couplings were in use. *Norfolk & W. Ry. Co. v. McDonald's Adm'r*, 88 Va. 352, 13 S. E. 706.

Also, where a brakeman, a minor, was injured while coupling cars, the pin and drawhead being obviously defective; and the rule follows though the action be brought for loss of services by parent. *Goins v. Railway Co.*, 37 Mo. App. 221.

Brakemen knowing the defective condition of drawheads, and knowing, or being presumed to know by the exercise of ordinary care, the increased risk, assume such. *St. Louis, A. & T. Ry. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 653.

A person who takes service with a railway company that uses double headers assumes all risks incident to such use. *Hawk v. Railroad Co. (Pa. Sup.)* 11 Atl. 459.

brought nearly together, this difference could have been, at least, much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangered his own life by not seeing, observing, or knowing of such difference in the elevation of the company's couplings. Did not the intestate have the same, if not superior, means of knowing this difference, to that of the company? If the negligence of the intestate and that of the company are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as matter of law."<sup>32</sup> In *Day v. Railway Co.*<sup>33</sup> a brakeman was injured in coupling cars by direction of the conductor, such coupling having been made dangerous by reason of lumber on one of the

<sup>32</sup> *Goltz v. Railway Co.*, 76 Wis. 143, 44 N. W. 752; *Day v. Railway Co.*, 42 Mich. 525, 4 N. W. 203.

<sup>33</sup> 42 Mich. 525, 4 N. W. 203.

#### **Loaded Cars.**

The courts are not agreed upon the question whether cars negligently loaded, where the materials, such as lumber or iron rails, project over the ends to such an extent as to increase the hazard of coupling such cars, is a risk assumed by the employé; some courts holding that such method or manner of loading is either the act of a fellow servant, the loading pertaining to the operation of the train and use of the appliances, or that the plaintiff has at least equal knowledge with the defendant of such act, and therefore cannot recover (*Brice v. Railroad Co.*, [Ky.] 9 S. W. 288; *Scott v. Navigation Co.*, 14 Or. 211, 13 Pac. 98; *Mexican Cent. Ry. Co. v. Shean* [Tex. Sup.] 18 S. W. 151), while others hold that, within the principle that the master is required to furnish his servant a safe place to work, etc., the duty becomes personal upon the master to see that

cars projecting forward. It was held that such risk was one assumed, on the ground that such brakeman is presumed to know better than the conductor the precise danger. The supreme court of Iowa, in *Haugh v. Railway Co.*,<sup>84</sup> upon a somewhat similar state of facts, reach a different conclusion; holding that the servant had a right to presume that the car was properly loaded, and that he was not guilty of contributory negligence in not closely examining it; that the loading, whether done by the defendant's servants or others, must be deemed the act of the defendant, whose duty it was to see that it was properly done. In the discussion of the facts and law applicable to this case, the court recognizes, to some extent, the rule that imposes upon the servant the duty to keep his eyes open and to exercise reasonable care to guard against dangers to himself, but seem to attach controlling importance to the fact that the servant was acting in obedience to an unqualified order to bring out the car, given to him at the last moment, and requiring immediate action.

It may be questionable whether a yardmaster, at this day, has the right to assume that all cars are properly loaded, so as to be not more than ordinarily dangerous to one engaged in coupling. The great commerce carried on by means of railroads, necessitating the sending of cars over different roads for great distances, whereby the loading may become more or less disturbed, places with full force the duty upon those who have to handle such cars, and connect them together, of vigilance and care in such work. They have superior knowledge or means of knowledge to

cars are properly loaded, and no increase of risk is occasioned to the servant by the manner of loading (*Dewey v. Railway Co.*, 97 Mich. 329, 52 N. W. 942, and 56 N. W. 756; *Haugh v. Railway Co.*, 73 Iowa, 66, 35 N. W. 116).

<sup>84</sup> 73 Iowa, 66, 35 N. W. 116.

that of the master as to such conditions, or their being likely to exist.<sup>35</sup>

The doctrine under consideration has particular reference to foreign cars. We have seen, ante, that the duty of the company as to such cars, ordinarily, is that of inspection merely to ascertain or discover defects. It is a matter of common knowledge that cars of different manner of construction are being constantly received and hauled. The true rule as to such cars is very forcibly stated in *Baldwin v. Railway Co.*<sup>36</sup> The occasional or frequent use of such cars on any road, in the ordinary course of business, is one of the ordinary risks an employé assumes. He knows, or is bound to know, that cars from other roads are being constantly hauled over the road whose employé he is. The most ordinary observation will teach him this. He must know these cars may be differently constructed. Public policy has some bearing upon the proposition.<sup>37</sup>

The reason for the rule is well stated in *Indianapolis, B. & W. R. Co. v. Flanigan*,<sup>38</sup> where the court say: "If plaintiff knew such cars were in use, and that they were unsafe, he ought not to have taken service with the defendant. Prior to his engagement, defendant, in common with all other railroad companies, had been drawing cars of this

<sup>35</sup> *Ballou v. Railway Co.*, 54 Wis. 267, 11 N. W. 559; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 219, 7 N. W. 791; *Marsh v. Chickering*, 101 N. Y. 390, 5 N. E. 56; *Balle v. Detroit Leather Co.*, 73 Mich. 160, 41 N. W. 216; *Hewitt v. Railway Co.*, 67 Mich. 66, 34 N. W. 659.

<sup>36</sup> 50 Iowa, 680.

<sup>37</sup> *Indianapolis, B. & W. Ry. Co. v. Flanigan*, 77 Ill. 365; *Kelly v. Abbot*, 63 Wis. 310, 23 N. W. 890; *Ballou v. Railway Co.*, 54 Wis. 257, 11 N. W. 559; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112; *Whitwam v. Railroad Co.*, 58 Wis. 408, 17 N. W. 124; *Hathaway v. Railway Co.*, 51 Mich. 253, 16 N. W. 634.

<sup>38</sup> 77 Ill., on page 369.

particular make. Their character must have been generally known. They were known to be safe if care was used in operating them, but dangerous, like all railroad labor, unless the usual caution was observed. Defendant had the right to presume plaintiff entered its service with knowledge that cars of that description were in daily use upon its road." The court also recognizes the distinction between such cars as constructed and their condition of repair, when they say: "A very different question would arise had the injury to plaintiff been produced by a car defective and unfit for service when it was received, or had defendant suffered it, while in its possession, to become unsafe; but that question cannot arise in this case."

The rule has often been applied to cars owned or in general use by a railroad company. In fact, where the cars in use by a railroad company are of different make or construction, to such an extent, at least, as to become apparent to one whose employment requires him to use or couple them, such employé will be presumed to have knowledge thereof, and to assume the attending risk.<sup>89</sup>

<sup>89</sup> *Hulett v. Railway Co.*, 67 Mo. 239; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 83 Mich. 133; *Toledo, W. & W. Ry. Co. v. Ashbury*, 84 Ill. 429.

## CHAPTER XI.

### PROMISE TO REPAIR.

**A promise to repair a defect or obviate a danger by the master relieves the servant from the assumption of the risk, p. 207.**

**If repair is not made within a reasonable time after the promise, the servant will be deemed to have waived his objections and assumed the risk, pp. 208, 215.**

**When such a promise is relied upon, it must appear that the servant was led by it to continue the employment, p. 208.**

**The doctrine herein discussed as to the character, condition, and safety of appliances does not apply to ordinary implements other than machinery used upon a farm or in ordinary labor, p. 209.**

**Nor does it apply to defects in ladders, p. 210.**

**A promise to repair will not relieve the servant from an assumption of the risk in all cases. The question still remains whether a prudent workman would take the risk notwithstanding the promise, pp. 211, 215.**

**A mere objection and protest by the servant is not sufficient. There must also be a promise to remedy the defect, upon which the servant relies, p. 212.**

**The promise must be that of the master, or of some one representing him, with authority to have the change made, p. 216.**

The promise must be definite as to time, p. 217.

Performing a hazardous service outside of his employment, for fear of discharge if he refuses, by a servant who comprehends its dangers, will not relieve him from an assumption of the risks, pp. 217, 222.

The duty to give warning when there has been a change in the servant's duties is only applicable when the increased danger arises from causes hidden and secret, and such as would reasonably escape his observation, pp. 218-220.

No negligence can be predicated upon the fact alone that the servant was directed to perform temporary work outside of the service for which he was engaged, pp. 220, 222, 223.

The same presumption, to wit, that a servant is competent to perform the duties and avoid dangers, etc., does not apply in the case of temporary work outside of his employment, as it does in his regular employment, p. 221.

Such servant, however, is presumed to know and comprehend obvious dangers, requiring no skill or experience to appreciate, p. 221.

If such service is accepted or duty performed at the request of a fellow servant, or one having no authority from the master over him, the master is not responsible, p. 221.

It is otherwise when the other servant has authority, p. 225.

Knowledge of a defect or of danger may not preclude the servant, when, having the right to abandon the service because it is dangerous, he refrains from doing so in conse-



quence of assurances by the master that the danger will be removed. Such assurances remove all ground for holding that the servant, by continuing in the employment, engages to assume the risk.<sup>1</sup>

In *Hough v. Railway Co.*<sup>2</sup> it was said by Justice Harlan: "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept. If, however, the servant, after giving notice of the defect, and after promise of repair by the employer, still continues in the employment an unreasonable time after the employer could remove the defect, he would then be deemed to have waived his objections, and assumed the risk of the premises or of the machinery in the unsafe and dangerous condition in which it was."<sup>3</sup>

It must appear that the servant was led to continue the employment by the master's promise that the defect com-

<sup>1</sup> *Stephenson v. Duncan*, 73 Wis. 407, 41 N. W. 337; *Union Manuf'g Co. v. Morrissey*, 40 Ohio St. 150; *Lanling v. Railroad Co.*, 49 N. Y. 521; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Greenleaf v. Railway Co.*, 33 Iowa, 52; *Kroy v. Railway Co.*, 32 Iowa, 357; *Le Clair v. Railroad Co.*, 20 Minn. 9 (Gil. 1); *Greene v. Railway Co.*, 31 Minn. 248, 17 N. W. 378; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, and 15 N. E. 824; *Corcoran v. Milwaukee Gaslight Co.*, 81 Wis. 194, 51 N. W. 328; *Lyttle v. Railway Co.*, 84 Mich. 289, 47 N. W. 571; *Hough v. Railway Co.*, 100 U. S. 213.

<sup>2</sup> 100 U. S. 213.

<sup>3</sup> *Stephenson v. Duncan*, 73 Wis. 407, 41 N. W. 337; *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007.

plained of should be removed. Where the servant does not complain upon his own account, and continues in the employment with full knowledge of the risk, he cannot recover of the master because the latter, when the defective condition is called to his attention by the servant, gives assurances, which do not induce the servant to remain, that the defect should be remedied.<sup>4</sup> And ordinarily, whether the servant had waived the neglect of the master, and assumed the risk after promise of repair, is a question for the jury.<sup>5</sup> Yet it may have been given for such a length of time, or with such conditions, that the court can determine, as matter of law, that its performance has been waived.<sup>6</sup>

In cases where persons are employed in the performance of ordinary labor, in which no machinery is used and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill or judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence if, in using a utensil

<sup>4</sup> *Lewis v. Railway Co.*, 153 Mass. 76, 26 N. E. 431. /

<sup>5</sup> *Laning v. Railroad Co.*, 49 N. Y. 521; *Stephenson v. Duncan*, 73 Wis. 407, 41 N. W. 337; *Union Manuf'g Co. v. Morrissey*, 40 Ohio St. 150; *Hawley v. Railway Co.*, 82 N. Y. 370; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Patterson v. Railroad Co.*, 76 Pa. St. 380; *Hough v. Railway Co.*, 100 U. S. 213.

<sup>6</sup> *Stephenson v. Duncan*, 73 Wis. 407, 41 N. W. 337; *Lewis v. Railway Co.*, 153 Mass. 76, 26 N. E. 431.

which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has therefore imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and, if he is injured, it is by reason of his own fault and negligence. The fact that he notifies the master of the defect, and asks for another implement, and the master promises to furnish the same, does not render the master responsible, if an accident occurs. A rule imposing such a liability in such a case would be far-reaching, and would extend the principle "that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish proper, perfect, and adequate machinery or other materials and appliances necessary for the proposed work," to many of the vocations of life for which it was never intended. The rule is one of just and salutary character, designed for the benefit of those engaged in work where machinery and materials are used, of which they can have but little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar.<sup>7</sup>

It was accordingly held that defects in a ladder used by the employés were not within the general rule, and that the promise to repair such implements, and those of like character and purpose, did not affect the master.\*

It has been held that where machinery is not defective, and there is a difference of opinion between an employé and his employer as to the safety of operating it in a given man-

<sup>7</sup> *Marsh v. Chickering*, 101 N. Y. 400, 5 N. E. 56; *Corcoran v. Milwaukee Gaslight Co.*, 81 Wis. 193, 51 N. W. 328; *Gowen v. Harley*, 6 C. C. A. 190, 56 Fed. 974.

\* *Marsh v. Chickering*, *supra*. *Corcoran v. Milwaukee Gaslight Co.*, *supra*.

ner, the employé, while contending it to be unsafe, remaining at work, no promise on the part of the master will be implied inducing the servant to so continue in the service, and that his doing so is at his own risk.

When there has been a promise to repair or obviate defects, and the servant has received an injury, after such promise, caused by the defect, the question then becomes one of ordinary care on the part of the employé,—whether, relying upon such inducement held out by the employer, a prudent workman would take the risk, as well as whether there were reasonable grounds at the time of the injury for expecting the employer would remove the defects.

The language of some of the cases would seem to warrant the conclusion that a promise to repair, on the part of the master, was in effect a guaranty on his part to indemnify the servant against injury while he continued in the employment exposed to the known peril. Yet such is hardly the effect of the rule. I think—and such is the result of the great majority of the cases—that ordinarily it is a question for the jury, though sometimes for the court.

Relying upon such inducement held out by his employer, the most prudent workman will sometimes take risks, not merely on account of his own necessities, but in consideration of his employer's, whose interests require his continued service. Yet a danger may be so apparent, and of such character, even with the exercise of great prudence, where injury is more than ordinarily likely to result from continued service, that it would be deemed an act of utter rashness to remain. In such a case it would seem that something more than a mere promise to repair, indefinite as to time, must appear, in order to constitute a contract of absolute indemnity against injury; that the true principle is that the knowledge of the danger arising from the defect, and the promise on the part of the employer to

repair, are to be taken into consideration by the jury, in connection with all the circumstances of the case, in determining whether the plaintiff was guilty of any want of ordinary care. These views seem to be sustained by the court in *Union Manuf'g Co. v. Morrissey*.<sup>8</sup>

There is an apparent conflict in the authorities as to whether an objection and protest on the part of the servant relieve him from the assumption of a known peril. With some exceptions, it will be found that the conflict is more apparent, from the use of unguarded language by courts, than real, and that there is now but little substantial conflict upon the subject. The great weight of authority upon this subject is that there must not only be objection, amounting to a protest, on the part of the servant, against a continuance in the perilous employment, but that there must be a promise to obviate the defect or increased danger, either express or implied, sufficient to induce the servant to remain, and upon which he acted. As stated in *Indianapolis & St. L. Ry. Co. v. Watson*:<sup>9</sup> "The rule which we regard as sound in principle, and supported by authority, may be thus expressed: The employé who continues in the service of his employer after notice of a defect, augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent, the exception cannot exist." The court further say: "The rule absolving the servant from the assumption of risks is an exception to the general rule; for the general rule is that the servant does assume all the ordinary risks of the service he enters. There must therefore be some ground for the exception, and the only solid ground that can be

<sup>8</sup> 40 Ohio St. 150.

<sup>9</sup> 114 Ind. 20, 14 N. E. 721, and 15 N. E. 824.

found is the inducement held out by the mere agreement of the master. If this be not so, then an employé, at his first entrance into service, might object and protest, and successfully claim that he was exempt from the perils of the service. The servant is at liberty to quit the service, and if he remains after knowledge of its danger he assumes the risk, even though he may object or complain, unless he is induced to continue by a promise of the master to remove the cause that augments the danger, since, if this be not true, it must be true that any objection or complaint made at any time will absolve him from the risk; and this conclusion cannot be sustained. As the exception concedes and tries the general rule, it cannot be allowed to destroy it; for if it were allowed to do this, it would cease to be an exception."

In *Sweeney v. Berlin & J. Env. Co.*<sup>10</sup> the plaintiff was employed to work upon a machine of an old pattern, which had not all the safeguards of newer machines. He worked on it for several years, and then told the superintendent it ought to have an additional safeguard. The superintendent told him to go ahead with it, and be careful, and, if he did not care about doing it, he could get out. He referred him to the machinist, who said he would put on such additional safeguard when he had time. The court say: "But we think there was no promise made to the plaintiff, nor inducement offered him to take the risk. It cannot be said that there was any connection between the conversation set forth and the continuance of the plaintiff in defendant's employment. The defendant might, if he chose, carry on his business with an old rather than a new machine, and could not be required to keep in his employ a servant who would not run it. He might therefore call upon the servant to perform the stipulated service, and discharge him if

<sup>10</sup> 101 N. Y. 520, 5 N. E. 358.

In *Stephenson v. Duncan*<sup>25</sup> the court were compelled to hold as matter of law, from the allegations of the complaint, that the servant had waived his objections. The allegation was that the defendant had ample time and opportunity, and was abundantly able, to repair and put in safe condition the machinery and apparatus between the time the plaintiff informed him of its defects and the time when plaintiff was injured, and failed to do so, as was his duty, for the protection of the plaintiff. The court say: "This allegation fairly implies that the plaintiff continued his employment beyond the period of time within which he might reasonably expect the defendant would keep his promise and put the machinery in proper condition."

The promise must be that of the master. It was said by the court in *Ehmcke v. Porter*:<sup>26</sup> "A master may intrust to another the performance of the duty he owes to his servants to exercise care in providing them a safe place in which, and safe instrumentalities with which, to do their work; and when he has done so, a promise to a servant by such other to remedy the dangerous condition of things is equivalent to a promise by the master himself." In that case complaint was made to the millwright of an elevator, and a promise to remedy the defect was given by him. The court further say: "It does not appear that such millwright was in charge of the elevator, or over the men there employed, or that it was his duty or he had any authority to determine upon or make any changes in construction. He appears to have been merely an employé whose business it was to make repairs when needed, and perhaps to make alterations when determined upon by somebody else who might have authority to determine upon them and have them made."

<sup>25</sup> 73 Wis. 404, 41 N. W. 337.

<sup>26</sup> 45 Minn. 338, 47 N. W. 1066.

In *Patterson v. Railway Co.*<sup>27</sup> it was held that notice to defendant's superintendent, who had charge of the particular department of the business, and promise of repair by him, were binding upon the company.

In *Marquette, H. & O. R. Co. v. Spear*,<sup>28</sup> where the promise to repair a defective engine was to repair it some time, Judge Cooley said: "When there is a promise to repair immediately or within a fixed time, and a party relies upon its being done, and is injured because of such reliance, he has a right to complain. But this is not such a case. The promise was wholly indefinite, and the plaintiffs never relied upon it, except as a probable future event. They knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risks of what actually happened."

As somewhat analogous to this rule, it has been urged by some courts that when the servant, though comprehending the danger, has been induced to perform a hazardous service outside of his ordinary employment, sometimes within its scope, by the fear of discharge if he refused, he ought to recover from the master, when injured in performing such service. There are but few courts that have advanced so far as to hold this an independent ground of recovery, though many courts often urge it as a consideration in the determination of the case.

In the case of *Leary v. Railroad Co.*<sup>29</sup> the question was directly presented and considered, and the court refused to accept or approve it as having any legal weight. They assert, what must be true, that the servant is presumed to be a free moral agent; that he is competent to act and

<sup>27</sup> 76 Pa. St. 389.

<sup>28</sup> 44 Mich. 169, 6 N. W. 202.

<sup>29</sup> 139 Mass. 580, 2 N. W. 115.



judge for himself; that it is optional with him to quit the service or perform the act required, and, if he choose the latter, it must be considered as voluntary on his part.

The question was, to some extent at least, considered in *Cole v. Railway Co.*,<sup>30</sup> and the court said that it neither approved nor disapproved of the position taken by the Massachusetts court.

In *Atchison, T. & S. F. R. Co. v. Schroeder*<sup>31</sup> it was held that a section foreman, continuing in the employment for three months after a refusal by the company to furnish additional help, could not be heard to claim that the master was liable to him for injuries received by reason of insufficient help, even though the master had threatened to discharge him if he did not perform his duties without additional help.<sup>32</sup>

The master is required, so far as he can by reasonable care, to avoid exposing his servant to extraordinary risks which could have been reasonably anticipated at the time of the contract of service, though, as to such extraordinary risks, the master does not guaranty against them. In other words, the master agrees not to subject the servant to greater risks than those which fairly and properly belong to the particular service for which the servant is engaged.<sup>33</sup> He must not knowingly or negligently expose his servant to extraordinary or unreasonable perils, against which the servant, from want of skill or by reason of youth

<sup>30</sup> 71 Wis. 114, 37 N. W. 84.

<sup>31</sup> 47 Kan. 315, 27 Pac. 965.

<sup>32</sup> *Prentiss v. Kent Furniture Manuf'g Co.*, 63 Mich. 478, 30 N. W. 110.

<sup>33</sup> *Wonder v. Baltimore & O. R. Co.*, 32 Md. 416; *Lake Shore & M. Ry. Co. v. McCormick*, 74 Ind. 440; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Same v. Wright*, 115 Ind. 378, 16 N. E. 145, and 17 N. E. 584.

or physical inability, could not, by the use of ordinary care and prudence, under the circumstances, guard himself,<sup>34</sup> unless he has been apprised of the danger.<sup>35</sup> The foregoing rules have been discussed in a previous chapter<sup>36</sup> as relating to ordinary risks incident to the employment, within the scope of the contract, as well as to extrinsic causes. The purpose now is briefly to restate the principles as bearing upon the question of extraordinary or increased risks. It more nearly relates to latent defects and latent or concealed dangers.

The master is bound to disclose to his servant latent defects and dangers of which he has knowledge, or of which he ought to have knowledge, by the exercise of reasonable attention, care, and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care.<sup>37</sup> He must not only give the servant warning of danger, but he must also give him such instruction as will enable him to avoid injury, unless both the danger and means of avoiding it while he is performing the service required are apparent.<sup>38</sup> But he is not bound to anticipate extraordinary, unusual, or improbable occurrences, which involve inattention on the part of the servant.<sup>39</sup> Such warning may be given by general or special instructions or rules pointing out the danger, and means of avoiding it.<sup>40</sup>

<sup>34</sup> *State v. Malster*, 57 Md. 308.

<sup>35</sup> *Goins v. Railway Co.*, 37 Mo. App. 221.

<sup>36</sup> Chapter 9.

<sup>37</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187.

<sup>38</sup> *Atlas Engine Works v. Randall*, 100 Ind. 293; *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, and 17 N. E. 584.

<sup>39</sup> *Atlas Engine Works v. Randall*, 100 Ind. 298; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

<sup>40</sup> *Atlas Engine Works v. Randall*, 100 Ind. 293; *Mitchell v. Rob-*

Where a change has been made in the nature of the servant's duties, the duty to give warning is only applicable where the increased risk or danger to the employé arises from causes hidden and secret, and such as would reasonably escape his observation.<sup>41</sup>

The question most frequently arises in those cases where the servant has been called to perform a service outside of the scope of his employment, and therefore where the risk is not contemplated at the time of the contract; and courts have differed somewhat as to the character and extent of risks that shall be deemed to have been assumed,—whether the risks assumed have any relation to the original contract of service. Whatever may be the rule as to the relation of such risks to the contract, it is now quite generally held that where an employé of mature years, and of ordinary intelligence and experience, is directed by an employer to do a temporary work, outside of the business he has engaged to do, without objection on account of his want of knowledge, skill, or experience in doing such work, no negligence can be predicated upon such act alone.<sup>42</sup> In *Mann v. Oriental Print Works*,<sup>43</sup> this view was not approved.

*inson*, 80 Ind. 281; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Railroad Co. v. Fort*, 17 Wall. 553.

<sup>41</sup> *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47.

<sup>42</sup> *Paule v. Florence Min. Co.*, 80 Wis. 356, 50 N. W. 189; *Cole v. Chicago & N. W. Ry. Co.*, 71 Wis. 114, 37 N. W. 84; *Capper v. Louisville, E. & St. L. Ry. Co.*, 103 Ind. 305, 2 N. E. 749; *Cummings v. Collins*, 61 Mo. 520; *Hulett v. Railway Co.*, 67 Mo. 239; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Buzzell v. Laconia Manuf'g Co.*, 48 Me. 113; *Thompson v. Railway Co.*, 14 Fed. 564; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449.

<sup>43</sup> 11 R. L. 152.

The same duty rests upon the master as to warning and instruction as to duties within the scope of the employment, but as to temporary work outside of the employment the same presumption does not apply, to wit: "That he is competent to perform the duties of the position which he seeks, and competent to apprehend and avoid all dangers that may be discovered by ordinary care."<sup>44</sup> However, he is presumed to know and comprehend obvious dangers, which require no skill or experience to appreciate, or such obvious dangers as the skill and experience he may have ought reasonably to charge him with. If, therefore, a common laborer who attempts to perform a hazardous service temporarily, outside of his employment, upon request of the master, though not objecting, is injured while performing such duty, his apparent consent alone will not defeat his right of recovery, though the danger is apparent to a person possessed of skill, but not to a common laborer.<sup>45</sup>

The rule first stated may not be applicable, also, when the temporary work required of the servant is entirely different in kind, and the perils of which are such that the servant could acquire no knowledge of them in the business for which he was engaged.<sup>46</sup>

If the servant enters upon the service at the request of a fellow servant, or one having no authority from the master over him, then he cannot hold the master responsible.<sup>47</sup>

<sup>44</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 152, 5 N. E. 187.

<sup>45</sup> *Gill v. Homrighausen*, 79 Wis. 634, 48 N. W. 862; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573.

<sup>46</sup> *Paule v. Florence Min. Co.*, 80 Wis. 356, 50 N. W. 189; *Mann v. Oriental Print Works*, 11 R. I. 152.

<sup>47</sup> *Knox v. Pioneer Coal Co.*, 90 Tenn. 546, 18 S. W. 255.

While great stress is laid in some cases upon the fact that the risk has been increased, as well as, in other cases, that the servant was injured while in the performance of a hazardous act outside of his general employment, yet it is difficult to ascertain that any special importance is to be attached to that fact alone, any further than that the risks of the general employment, thus increased, are not assumed as risks incident to the employment; and therefore knowledge thereof, actual or presumed, must be shown by the servant, unless they are such as are obvious, requiring no special knowledge or skill to understand or appreciate. If such dangers are not obvious, and the employé may not be presumed to understand or appreciate them, then he must be warned and instructed. I know of no rule that where the servant fully understands and comprehends the dangers of an increased risk, or of a risk attendant upon a temporary or occasional act of service, and he performs the act, or attempts so to do, the master is liable for the injury he may sustain, merely upon the ground of such increased risk, or risk attending such temporary employment. The liability in these as in other respects is made to depend upon the knowledge and experience of the servant, and the warning and instructions given, where any such are by law required.

The rule has been stated that if, while in the performance of such a temporary service, the servant's opportunity for observing the danger was equal to that of the company, or if he was required to perform an unusually dangerous service for good reason, as for the safety of passengers, then the master cannot be said to have been negligent.<sup>48</sup>

In *Jones v. Railway Co.*,<sup>49</sup> from the report of the case it

<sup>48</sup> *Houston & T. C. Ry. Co. v. Fowler*, 56 Tex. 452.

<sup>49</sup> 49 Mich. 573, 14 N. W. 551.

might be understood that the mere fact of being required to perform other duties than such as were properly embraced in his contract would impose a liability upon the master to respond in damages for injury he might sustain while so engaged. Yet such could not have been intended by the court, but rather the ground for recovery was within the principles stated in *Chicago & N. W. Ry. Co. v. Bayfield*;<sup>50</sup> in fact, the court so state. There the recovery proceeded upon the ground of directing an inexperienced lad, who did not comprehend the danger, to perform the hazardous duty of applying brakes to moving cars.

The same position was taken by counsel in *Cole v. Chicago & N. W. Ry. Co.*,<sup>51</sup> to wit: That the mere direction of the master to perform such temporary and dangerous work is negligence on the part of the master sufficient to sustain the action of the employé so injured in the performance of such work while he is using ordinary care on his part. The court say: "We are very clear that the broad rule contended for by the learned counsel for the respondent is not sustained by the authorities, nor by the general rules of law which define the relations of employer and employé. Some of the cases cited may have some general statements which give some countenance to the rule as stated by counsel; but when the facts of each case are considered, it will, we think, be found that no such broad rule was ever intended to be sanctioned by the courts." The court further state that negligence of the master cannot be predicated simply on the fact that he directed his employé to do the work; that in every case of negligence the evidence must show some violation of duty on the part of the master. No case can be found where it has been held that the mere fact that the em-

<sup>50</sup> 37 Mich. 205.

<sup>51</sup> 71 Wis. 114, 37 N. W. 84.

ployer requested his employé to perform a temporary work outside of his ordinary employment was a violation of any duty which he owed to his employé. If the particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the servant so directed has not the requisite knowledge or skill for doing the work with safety, and such want of skill is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the master to do the work might be justly held to be a violation of duty which he owes to his employé, even though the employé undertook to do the work without objection or protest upon his part. The Wisconsin court reviews many leading cases upon the subject, including those relied upon by the respondent's counsel, and assert that none sustain the position contended for by such counsel.<sup>52</sup> The court further say they are not called upon to decide what the rule would be if the employé, when ordered to do such temporary work, objected on account of his want of experience and knowledge, and, notwithstanding such declaration, his employer insisted upon it, and thereupon he undertook to do the work, after such protest, rather than subject himself to the risk of being discharged from his em-

<sup>52</sup> *McGinnis v. Bridge Co.*, 49 Mich. 466, 13 N. W. 819; *Wormell v. Railway Co.*, 79 Me. 397, 10 Atl. 49; *Rummell v. Dillworth*, 111 Pa. St. 343, 2 Atl. 355, 363; *Leary v. Railway Co.*, 139 Mass. 587, 2 N. E. 115; *Union Pac. R. Co. v. Fort*, 17 Wall. 554; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Lalor v. Railway Co.*, 52 Ill. 401; *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 374; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Mann v. Oriental Print Works*, 11 R. I. 152; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Cook v. Railway Co.*, 34 Minn. 45, 24 N. W. 311; *O'Connor v. Adams*, 120 Mass. 427; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449.

ployment. They neither approve nor disaffirm the rule stated in *Leary v. Railroad Co.*<sup>53</sup>

The weight of authority, as stated in note to *Cole v. Railway Co.*, is that the mere fact of objection and protest by the employé, the conduct of the master not amounting to coercion, does not change the rule; and many cases are cited.<sup>54</sup>

The doctrine stated in *Mann v. Oriental Print Works*<sup>55</sup> is: If a servant is placed under the orders of another servant, and is suddenly called by the latter to perform a hazardous service out of his sphere, but within the sphere of duty of such commanding servant, and was thus subjected to a risk with which he was not acquainted, or to a particular or greater risk at that time, and of which he was not informed or cautioned, the master will be liable for consequent injuries. Such superior servant, under such circumstances, represents the master. If the act required to be done was not one which the superior servant was charged with having or seeing done, then the master would not be liable. In this case a fireman was called upon by the engineer to assist in throwing a belt from a pulley which worked a pump.

<sup>53</sup> 130 Mass. 587, 2 N. E. 115.

<sup>54</sup> *Sweeney v. Berlin & J. Env. Co.*, 101 N. Y. 520, 5 N. E. 358; *Indianapolis & St. L. Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, and 15 N. E. 824; *Webber v. Piper*, 38 Hun, 353; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133.

<sup>55</sup> 11 R. I. 152.



## CHAPTER XII.

### FELLOW SERVANTS.

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#### THE RULE IN NEW YORK.

**The distinctive features. Those engaged in performing duties personal to the master are not fellow servants with those otherwise engaged, p. 229.**

**The relation does not depend upon the doctrine of "respondeat superior," p. 230.**

**Nor upon the grade or rank of the offending employe, p. 230.**

**The liability of the master is thus made to depend upon the character of the act causing injury, without regard to the rank of the employe performing it, p. 230.**

**Those servants whose duty it is to use the appliances furnished by the master are engaged in a common service, without reference to superiority, p. 233.**

**They are not engaged in the same common service with those who represent the master in furnishing such appliances, p. 234.**

**The former class not fellow servants as to the latter, p. 234.**

**Those servants, however, who are working together in making or repairing the appliances, though**

each performing the master's duty as to other servants who are to use them, are, as to each other, fellow servants, p. 234.

Those having superintendence of various departments of the business of corporations, with authority to employ and discharge laborers, provide materials and machinery, and generally to direct and control, under general powers and instructions from the directors, are to be considered vice principals, p. 235.

When the principal is an individual acting *sui juris*, and is present himself, exercising supervision, then no responsibility attaches in respect to the acts of a competent foreman or agent, p. 236.

When the principal is an individual, and has made one his alter ego, to whom he has left everything, then such person will be considered a vice principal, p. 236.

A superintendent is still a servant in respect to the doing of such work by him as properly belongs to a servant to do, p. 236.

The true test is, was the offending servant in the performance of the master's duty, or charged with the performance thereof, not generally, but in reference to the particular act? p. 238.

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The rule is the same as the rule in New York upon the question of the master's duty in respect to premises, appliances, machinery, and the employment of servants, p. 238.

**Those who represent the master in these respects are engaged in a separate and distinct employment from those who are engaged in their use, and are not fellow servants, p. 238.**

**A distinction is made between servants exercising no supervision over others and agents clothed with the management of a distinct department of the business, p. 239.**

**The former are fellow servants as to each other; the latter, not as to the former, p. 239.**

**The real distinction between the rule of the federal court and that of New York lies in what the court may determine is a distinct department, p. 240.**

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**The relation of fellow servant does not depend upon rank or grade, p. 241.**

#### **THE RULE IN MAINE.**

**The New York rule as to those engaged in furnishing or repairing machinery or appliances, and employing servants, prevails in this state, p. 243.**

**The relation does not depend upon rank or grade, p. 244.**

**If the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department thereof, then the rule may be different, p. 244.**

**They are not fellow servants of those employed to use the machinery or appliances, p. 245.**

The discussion of this branch of our subject is fraught with more than ordinary difficulty. While it is a universal rule at common law that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence of other servants in his employ, engaged in the same common or general service or employment, yet the authorities are so confused in determining who are such servants, or upon what principles this should be determined, that it requires a thorough acquaintance with the doctrine, as recognized and declared by the courts of each state, to properly apply the decisions of its courts to a given case.

#### THE RULE IN NEW YORK.

In previous chapters it has been discussed what principles and conditions apply in some of the states, in determining whether certain duties were such as were personal to the master, or were of such character that the performance thereof might be delegated to a servant, who alone would be responsible for the manner of their performance; that as to the premises and appliances, the selection and furnishing of servants, and the promulgation of proper rules, such duties were personal to the master, the performance of which he could not delegate to another, so as to relieve him from responsibility for injuries caused to a servant by neglect on the part of those selected to do those acts for him. Where such doctrine prevails as the established rule of law, none of those servants charged with the performance of such duties are to be considered as fellow servants of other servants otherwise employed, and it is only necessary to determine who are such among those

who are engaged in the use of the appliances or operation of the means provided. In such states, generally, the liability of the master to his servant for injuries sustained, while in his employ, by the wrongful or negligent act of another employé of the same master, does not depend upon the doctrine of "respondeat superior." It does not depend upon the grade or rank of the employé whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. On the same principle, however low the grade or rank of the employé, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master which he has confided to such inferior employé. The liability of the master is thus made to depend upon the character of the act, in the performance of which the injury arises, without regard to the rank of the employé performing it.

Such is the doctrine laid down by the majority of the court in the case of *Crispin v. Babbitt*.<sup>1</sup> The minority of

<sup>1</sup> 81 N. Y. 522.

Where a pit covered with planks between the defendant's tracks was uncovered by workmen to fix machinery therein, who neglected to replace them, whereby an employé, while uncoupling cars, fell in the pit and was injured, it was held that they were fellow servants. *Filbert v. Delaware & H. Canal Co.*, 121 N. Y. 207, 23 N. E. 1104.

A timber boss who superintended the repair of a mine, and assisted in making such repairs, is a fellow servant with other servants also assisting in making such repairs. *Jenkins v. Mahopac Iron-Ore Co.*, 57 Hun, 588, 10 N. Y. Supp. 484.

An ordinary train dispatcher and a locomotive fireman are fellow servants. *Hankins v. Railway Co.*, 55 Hun, 51, 8 N. Y. Supp. 272.

An employé engaged in oiling a machine in a factory, and the

the court recognized the doctrine stated, so far as it held that the relation of one servant to another is not determined by the fact that one has a superior position to the other, or has some control over other servants, or some management of the business in hand; but contended that when a servant is placed by the master in his place, to

engineer, are fellow servants. *Henshaw v. Pond's Extract Co.*, 66 Hun, 632, 21 N. Y. Supp. 177.

Where a master provides a safe place for his servant to work, it is the duty of a servant to guard it against insecurity; and if a servant is injured by neglect of such details, no matter by whom, the negligence is that of a fellow servant. *Geoghegan v. Atlas Steamship Co.*, 3 Misc. Rep. 224, 22 N. Y. Supp. 749.

A car inspector, while performing his duties, stepped between two cars standing on a track, on which other cars were shunted by other employes of defendants. A competent brakeman was present, who neglected his duty, which required him to be on such shunted cars, and they collided with a car being inspected, causing the death of the inspector. Held, that the failure of the brakeman to be on the shunted cars was the negligence of a co-servant. *Potter v. Railway Co.*, 136 N. Y. 77, 32 N. E. 603.

A laborer and an engineer in the employ of the same railway company on its road are fellow servants when the former is injured through the neglect of the latter. *Mele v. Canal Co.* (Super. N. Y.) 14 N. Y. Supp. 630.

Brakeman and conductor are fellow servants. *Slater v. Jewett*, 85 N. Y. 61.

Foreman and men under his direction are fellow servants (*Brown v. Maxwell*, 6 Hill, 592), even though he could not guard against his negligence or its consequences (*Sherman v. Railway Co.*, 17 N. Y. 153; *Malone v. Hathaway*, 64 N. Y. 5).

A laborer in the employ of a railroad company under an arrangement by which he is to be conveyed to his home every night free of charge, is, if injured while being so conveyed, through the neglect of the engineer, his fellow servant. *Russell v. Railway Co.*, 17 N. Y. 134.

The principle of "respondeat superior" applies only to the immediate employer of the servant through whose negligence an in-

represent him,—the alter ego of the master,—then he is not a fellow servant with those engaged in the same employment. If he is clothed with the general powers, and charged with the general duties, of the master, or, for the work in hand, is the superior whose commands are to be obeyed, whose acts are not to be questioned, by the other servants, he, for the time being, represents the master.

These different views represent generally the law of different states, though some of the states have adopted a doctrine embracing some of the features of each, though in all respects at variance with either. Thus it may be said—and we shall have occasion often to so designate—that the rule first above stated is the New York rule; and the

jury is sustained; hence an undertaker employed to superintend a funeral, who hires a number of carriages for the occasion, is not liable for an injury sustained through the negligence of the driver of one of the carriages. *Boniface v. Relyea*, 6 Rob. (N. Y.) 397.

If persons licensed to construct a sewer in a public street engage another to do the work for a stipulated sum, they are not liable to a third person for an injury resulting from the negligence of the servants of the contractor. *Blake v. Ferris*, 5 N. Y. 48.

To the effect that the principle “*respondeat superior*” only applies to the immediate employer of such servants, see *Pack v. Mayor, etc., of New York*, 8 N. Y. 222; *Kelly v. Mayor, etc., of New York*, 11 N. Y. 432; *Vanderpool v. Husson*, 28 Barb. 196; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Gardner v. Bennett*, 38 N. Y. Super. Ct. 197.

A common employer is not liable to a contractor for the negligence of another contractor, employed to perform a different portion of the same work. *Treadwell v. New York*, 1 Daly, 123.

Plaintiff was employed by a firm of stevedores to load a vessel from defendant's dock. Defendant furnished the hoisting apparatus, and person to manage the same. Plaintiff was injured through the negligent act of such person. Held, they were not fellow servants. *Sanford v. Standard Oil Co.*, 118 N. Y. 571, 24 N. E. 313.

A train dispatcher, vested with discretionary powers as to the running of trains, and authorized to change the running time, rep-

latter, though not quite, yet in its principal features is, the Ohio rule.

In the later case of *McCosker v. Railroad Co.*<sup>2</sup> in the opinion written by Finch, J., one of the dissenting judges in *Crispin v. Babbitt*, the doctrine established in the last-named case was approved. The proper distinction was thus tersely stated: "The yardmaster, through whose negligence the injury occurred, must be deemed to have been a fellow servant of the deceased as to all acts done within the range of the common employment, except such as were done in the performance of some duty which the master owed to his servant;" thus more firmly establishing as the law of that state the rule stated in former chapters,—that the master has performed his duty when he has furnished a sufficient number of competent serv-

resents the company, and is not a fellow servant of the engineers of trains, where they collide. *McChesney v. Railway Co.*, 66 Hun, 627, 21 N. Y. Supp. 207.

The superintendent of a railroad company represents the company, and is not a fellow servant of the employes. *Sheehan v. Railway Co.*, 91 N. Y. 332.

Where two railroad companies jointly use the same track, and the employé of one is injured by the negligence of an employé of the other, they are not fellow servants. *Noonan v. Railway Co.*, 131 N. Y. 594, 30 N. E. 67; *Gross v. Railway Co.*, 62 Hun, 619, 16 N. Y. Supp. 616.

Train dispatcher and operatives of trains are not fellow servants. *Flike v. Railway Co.*, 53 N. Y. 549; *Sheehan v. Railway Co.*, 91 N. Y. 332; *Booth v. Railway Co.*, 73 N. Y. 38.

In other states: *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544; *Dorrigan v. Railway Co.*, 52 Conn. 304; *McKune v. Railway Co.*, 66 Cal. 302, 5 Pac. 482; *Railway Co. v. Henderson*, 37 Ohio St. 552; *Chicago, B. & Q. Ry. Co. v. McLallen*, 84 Ill. 109; *Dobbin v. Railway Co.*, 81 N. C. 446; *Louisville & N. R. Co. v. Bowler*, 9 Helsk. 866; *Hunn v. Railway Co.*, 78 Mich. 513, 44 N. W. 502.

<sup>2</sup> 84 N. Y. 81.



ants, for the service in which all are engaged, to use and operate the appliances which it is his duty to furnish and maintain in a reasonably safe condition and repair for such use. All such servants are engaged in a common service, without reference to superiority or grade, but are not engaged in the same common service with those who represent the master in furnishing and maintaining the appliances, and are not, as to such, fellow servants.<sup>3</sup> Those who are working together in making or repairing the master's machinery or appliances are engaged in a common service, each performing the master's duty, and, as to each other, are fellow servants.<sup>4</sup>

The liability of the master is made to depend upon the character of the act, in the performance of which the injury is caused. If the act is one pertaining to the duty which the master owes to his servants, he is responsible to them for the manner of the performance of it. If it is one which pertains only to the duty of an operative, the employé performing it is a mere servant.<sup>5</sup>

• This distinction between the premises and appliances furnished for use, and the use of them, is to its fullest extent maintained in New York as determining the relation of employés. It is placed upon the ground of distinct employment, so aptly illustrated in an opinion by a judge of the federal court, who said: "The two kinds of business are as distinct as the making and repairing of a carriage is from running it." The master is not presumed to be present when his servants, whom he has selected with reasonable care, are in the performance of their duties. He has performed his duty towards them when he has

<sup>3</sup> *Brick v. Railway Co.*, 98 N. Y. 215.

<sup>4</sup> *Murphy v. Railway Co.*, 88 N. Y. 146.

<sup>5</sup> *Slater v. Jewett*, 85 N. Y. 74.

selected a sufficient number of skillful and competent persons to perform the service.

Whoever performs the duty of selecting servants stands in the master's place in that respect, and would not be a fellow servant with those employed by him, so as to relieve the master from liability for his neglect of duty in that respect; and if such servant or agent knowingly or negligently employed or retained incompetent servants, or negligently failed or neglected to employ sufficient in number, the master would be charged with his neglect in this respect, if it occasioned injury to the servant.

By the same reasoning, if the servant injured was selected by another agent or servant of the same master in the same enterprise, and the offending servant, causing injury, had no authority to select or discharge him, yet had authority to employ other servants, that fact would not place him in the master's place as to such act, but, as to the injured servant, he would be a co-employé or fellow servant.<sup>6</sup>

In this state a distinction is made in the case of corporations. In such cases there may be those who are vice principals, though employés or servants of the corporation, whose special duties relate to the use and operation of the corporation appliances. Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employés, provide materials and machinery for the service of the corporation, and generally to direct and control, under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordi-

<sup>6</sup> *Laning v. Railway Co.*, 49 N. Y. 521; *Malone v. Hathaway*, 64 N. Y. 9.

narly exercised by principals, and, within the limits of the delegated authority, as the acting principals. Their acts, in such case, are the acts of the corporation, for which and for whose neglect the corporation, within adjudged cases, must respond, as well to other servants of the company as to strangers. They are treated as general agents of the corporation in the several departments committed to their care. A person thus placed by a corporation in such a position of trust and authority may be fairly considered as its representative *pro hac vice*. But when the principal is an individual, acting *sui juris*, and there is no evidence of a surrender of power and control to any subordinate, and is present himself, superintending the establishment in person, no such presumption arises or responsibility attaches in respect of the acts of a competent and proper foreman selected by and in the employment of the principal.<sup>7</sup> But when the servant, by whose acts of negligence or want of skill other servants of the common employer have received injury, is the alter ego of the master, to whom the employer has left everything, then the middleman's negligence is the negligence of the employer, for which the latter is liable. The servant, in such case, represents the master, and is charged with the master's duty.<sup>8</sup>

It is not, however, every act of a superintendent for which a master is liable; for, notwithstanding his general supervisory powers, he is still a servant, and, in respect to such work as properly belongs to a servant to do, is, while performing it, discharging the duty of a servant, for whose negligence and carelessness the master is not responsible to co-servants.<sup>9</sup>

<sup>7</sup> *Malone v. Hathaway*, 64 N. Y. 12.

<sup>8</sup> *Malone v. Hathaway*, 64 N. Y. 12; *Corcoran v. Holbrook*, 59 N. Y. 517.

<sup>9</sup> *Hussey v. Cogger*, 112 N. Y. 616, 20 N. E. 556.

In *Hussey v. Coger* the master exercised no personal supervision over the work, but devolved its whole management and control upon a superintendent, who was authorized to employ and discharge workmen, to regulate and direct the manner of their work, to provide the means and appliances necessary to its prosecution, and to determine the time and place of its performance. The superintendent was thus employed by the master as his servant, but was delegated with the discharge of all those duties which, in the conduct of such work, rested upon the master to perform in respect to the persons employed thereon. He therefore stood, in respect to such duties so delegated, in the place of master to the persons thus employed. Yet the court say that the sole question in the case was whether the special work in which he was engaged at the time of the accident belonged to the class which pertained to the duty of master, or not. The master had provided a skilled and competent superintendent, a sufficient force, with all necessary and proper means and appliances to perform it, and a safe place, free from any inherent dangers, to carry it on; and he was not chargeable with the consequences of a place for work, made dangerous only by the carelessness and neglect of fellow servants, or for the negligent manner in which they used the tools and materials furnished them for their work. The superintendent directed certain of the employés to remove a hatch on a vessel being repaired, and, in obeying this direct command, they so negligently performed the work that it fell, causing injury to another employé. There was some evidence that cautionary signals ought to have been given. The court say: "Assuming none was given, yet the duty of giving the caution necessarily belonged to those doing the work, not the master. It was not part of the duty of the master to remove hatches, or to direct the particular mode of doing so, any

more than to direct workmen in the use of tools with which they perform their work. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches, or ordered it to be done by others. He was in either case performing the duty of a workman. Of course, the superintendent here represented the master as to the master's duty. The superintendent or general officer of a corporation is the master or principal as to those matters which are within his general duties or powers."

The true test in New York by which it may be determined whether the negligent act causing injury was the act chargeable to the master or the act of a co-employé or fellow servant is, was the offending servant in the performance of the master's duty, or charged with the performance thereof, not generally, but in reference to the particular act or omission causing such injury? If he was, then he represents the master, and the latter's responsibility follows. If not; if the act or omission was that of a servant,—that is, performing the work of a servant,—then, without reference to the grade of the servant or employé, or his right to employ or discharge men, or of his control over them, he is but a fellow servant, for whose failure of duty the employé assumes the risk.

#### THE RULE IN THE FEDERAL COURTS.

The supreme court of the United States, as we have seen, are in harmony with the court of appeals of New York upon the question of the master's duty in respect to the furnishing of reasonably safe premises, appliances, and machinery for the proper performance of the work required of his servants, and in selecting and retaining a sufficient number of competent servants; that the performance of these duties he cannot delegate so as to relieve him from

responsibility for neglect in the manner of their performance, when injury to a servant is caused thereby; that those who represent the master in the performance of such duties are engaged in a separate and distinct employment from those who are engaged in their use, and are not fellow servants.<sup>10</sup>

That court, however, makes a wide departure from the New York rule in determining who are fellow servants in the use of the premises, appliances, and machinery furnished by the master for use; in fact, ignoring such rule, and, except as modified by the recent decision in *Baltimore & O. R. Co. v. Baugh*,<sup>11</sup> adopting in most respects the doctrine established by the courts of Ohio.

Perhaps no decision of the court, excluding those affecting national or international questions, created greater surprise to the profession than that rendered by the court in *Chicago, M. & St. P. Ry. Co. v. Ross*.<sup>12</sup> It was in fact a new departure for that court. Its influence has been great and wide; many states, after years of uncertainty, adopting the rule there declared as the correct solution of a vexed problem. It was foretold by many jurists and lawyers that the doctrine thus announced was temporary, and its existence would be of short duration. It was rendered by a divided court (five to four); and while the opinion was very elaborate and exhaustive, yet the reasoning of the court was not generally satisfactory. The court say: "But notwithstanding the number and weight of such decisions [referring to those which repudiate the doctrine of superior and subordinate, or grade], there are in this country many adjudications of courts restricting the

<sup>10</sup> *Northern Pac. Ry. Co. v. Herbert*, 116 U. S. 650, 6 Sup. Ct. 590.

<sup>11</sup> 149 U. S. 368, 13 Sup. Ct. 914.

<sup>12</sup> 112 U. S. 377, 5 Sup. Ct. 184.

exemption to cases where the fellow servants are engaged in the same department, and under the same immediate direction, and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. There is, in our judgment, a clear distinction to be made, in their relation to the common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railroad train, occupies a very different position from the brakemen, the porters, and subordinate employes. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and everything essential to its successful movements, and all persons on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow servants in running the train under his directions; as to them and the train, he stands in the place of and represents the corporation. We agree with the courts of Ohio and Kentucky in holding (and the present case requires no further decision) that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has

the general management of it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

The force of the opinion is greatly weakened by the assumption, on the part of the distinguished jurist who wrote it, as to the duties, discretion, and authority of a conductor of a railway train. It is very clear that he was in error in these respects. It is well known that a conductor has no such discretion or authority; that trains are run and regulated by time-tables, or by express orders and directions, by telegraph or otherwise, issued and directed by train dispatchers, who directly represent the master. It is very evident, also, from the opinion, that it was sought to classify the train as a separate and distinct branch of the common employment and service, of which the conductor was in exclusive charge; but that position becomes untenable, in the light of the actual authority and discretion of such conductors. Consideration was given to the doctrine of superior and subordinate, yet not adopting such as a rule in all cases. This clearly appears from the language limiting the application of the decision. It is extremely difficult to place the decision upon any settled rule, or to determine that any established rule prevailing in any state was approved or adopted. It is more plain, perhaps, that the case was decided wholly upon its peculiar facts, and that some established rules were considered, but that none were controlling as to the final result.

The same court, in *Baltimore & O. R. Co. v. Baugh*,<sup>18</sup> attempt to explain fully what was decided in the *Ross Case*, and the grounds upon which the decision was placed. The

<sup>18</sup> 149 U. S. 368, 13 Sup. Ct. 914.



court say<sup>14</sup> that the controlling fact in that case "was the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business." The inquiry at once forces itself upon the mind, if every train, of the great number a corporation may have in use, is a separate branch of the common employment, then does it not logically follow that every machine shop, every station, every roundhouse, is also a separate branch? it being well known that the foreman or person in charge is clothed with far greater discretion and authority, and the sphere of his duties is far more important and extensive, than in the case of railroad conductors. Follow the inquiry to a logical conclusion, and necessarily the result will be that every superintendent or foreman charged with the performance of any particular work through the service of workmen under his control, and subject to his orders, becomes a vice principal.

In the latter case the court ignore the Ohio and Kentucky doctrine, and claim it was not considered in the Ross Case, as they say:<sup>15</sup> "There is nowhere in the opinion in that case an argument to show that the mere fact that one servant is given control over another destroys the relation of fellow servants." The reasoning in the Baugh Case is able, forcible, and convincing as to the true rule, and as classifying the duties and relations of the master, and is in full accord with the logic and the doctrine of the courts of New York, with the exception of applying the rule as to superintendents in charge of separate departments and branches of the master's business, which they admit was carried in the Ross Case to the utmost limit.

What this court would do in a proper case where the

<sup>14</sup> Page 381, 112 U. S., and page 184, 5 Sup. Ct.

<sup>15</sup> Page 381, 112 U. S., and page 184, 5 Sup. Ct.

evidence disclosed the limited authority and discretion which a conductor of a railroad train actually possesses, as roads are now operated, can be but a matter of conjecture. If it were then held that a conductor was a vice principal, it would have to be placed upon some other ground than that of absolute control, within the reasoning of the opinion in *Baltimore & O. Ry. Co. v. Baugh*.

There is one embarrassment, connected with almost every branch of our subject, as to which trial courts and the profession have great cause of regret: The decisions of courts of last resort savor too much of the individuality of the judges; and to this cause, more than any other, may we attribute the confusion that confronts us at almost every step. Each judge may have his peculiar views, which may have been induced by the decisions of the courts or the doctrine of the state in which he first entered upon his professional career, or where, possibly, he may have achieved his success, or possibly from the peculiar bent of his mind; and such views are apt to prevail over precedents long and well established.

The trial and inferior courts quite generally applied the doctrine of the *Ross Case* to the extent that it was generally accepted and understood; that is, recognizing to some extent, at least, the doctrine of superior and subordinate. The construction given to that decision by the recent decision in the *Baugh Case* has had the effect to overrule many of the decisions of the circuit courts, so far as they otherwise might constitute precedents. For this reason reference to such cases in notes would be profitless.

#### THE RULE IN MAINE.

The general rule that a master is not liable for an injury caused to a servant by the carelessness of a fellow servant

in the same common employment, unless the master is negligent in some matter he expressly or impliedly contracts with the servant to do, is the well-settled law of this state.<sup>16</sup> The court say, in the case cited: "Who is a fellow servant, within the meaning of the rule, is a question much discussed, upon which the authorities very essentially disagree. Different courts entertain different theories and views. This general rule has been extracted from the authorities: 'The decided weight of authority is to the effect that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who take the risk of each other's negligence.'<sup>17</sup> This seems to be an unobjectional definition; but, being general, difficulty arises in applying it to cases. The author, proceeding further, says:<sup>18</sup> 'The fact that the negligent servant, in his grade or employment, is superior to the servant injured, does not, in the opinion of most of the courts, take the case out of the rule; they are equally fellow servants, and the master is not liable. Within the meaning of this rule, a mere foreman of work is generally regarded as a fellow servant with those under his control. But if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department thereof, then the rule may be different.' These views are in general acceptable to us, and we think our own cases are in accord with them [citing many]. It is said in some cases that the exception to the rule presses more strongly

<sup>16</sup> Doughty v. Penobscot Log-Driving Co., 76 Me. 145.

<sup>17</sup> 2 Thomp. Neg. 1026.

<sup>18</sup> Id. 1028.

against corporations than against natural persons. This is not generally admitted. We do not see why the principle would not be the same. But corporations are more likely to deal through general agents than individuals or firms are."

It is also the settled law of Maine that those servants of the master who are employed in the furnishing or repair of machinery and appliances are not the fellow servants of those who are employed in their use. "To provide machinery, and keep it in repair, and to use it for the purpose intended, are very distinct matters. They are not employments in the same common business, tending to the same common result. The one may properly be said to begin only when the other ends."<sup>19</sup> "A servant engaged in the use, so far as regards the repair, of the machinery used, stands in the same position as any person not a servant, but who was rightfully in his or her position; and the same responsibilities and liabilities rest upon the master for acts of himself or servant as would in such case."<sup>20</sup> The court cites *Coombs v. New Bedford Cordage Co.*<sup>21</sup> as sustaining the position last stated. They must have misconstrued the doctrine of that case; the rule being in that state, as we have seen, that it is the duty of the master to provide suitable and safe machinery, but it relates ordinarily only to the purchase in the first instance, not to the repair; that those engaged in the repair are fellow servants with those engaged in the use.

The rule in this state (Maine) as to the master's duties is substantially the same as in New York in respect to reasonably safe premises, selection of competent servants,

<sup>19</sup> *Shanny v. Androscoggin Mills*, 66 Me. 426.

<sup>20</sup> *Shanny v. Androscoggin Mills*, 66 Me. 426.

<sup>21</sup> 102 Mass. 572.

and making and promulgation of rules. In fact, the doctrine in all aspects is substantially the same. If there is any difference, it is in the extent to which its application to superintending agents is limited.<sup>22</sup>

<sup>22</sup> Wormell v. Railway Co., 79 Me. 397, 10 Atl. 49.

## CHAPTER XIII.

### FELLOW SERVANTS (Continued).

#### THE RULE IN MASSACHUSETTS.

The doctrine first declared in this state, p. 248.

Public policy the reason for the doctrine, p. 248.

The test of the existence of the relation is a common employment, p. 248.

Not controlled by the fact that the employes may be working in different departments, or that one is of higher grade or greater authority, pp. 249, 250.

The distinction so clearly made in New York between those engaged in the furnishing and maintaining in repair of the appliances and those servants who use them is followed in respect to those who furnish in the first instance, p. 251.

As to those engaged in the ordinary repair of appliances, they are fellow servants with those who use them, p. 252.

The statement of the rule is controlled somewhat by language used in some cases, where it is held that there is a duty of supervision which is personal to the master, pp. 252-260.

Statute (Chapter 270, Laws 1887), p. 261.

#### THE RULE IN OHIO.

The New York rule as to those engaged in the furnishing, maintaining, and repairing of appliances is ignored, p. 263.

The broad rule exists in this state, p. 263.

### THE RULE IN MASSACHUSETTS.

The courts, in discussing the rule that ought to be applied in determining when the relation of fellow servants exists, go back to the reasoning in the early cases of *Farwell v. Boston & W. R. Corp.*<sup>1</sup> and *Murray v. S. C. R. Co.*<sup>2</sup> being the first cases in which the doctrine was declared in this country. The grounds upon which the principle was placed were decidedly different in the two courts.

The South Carolina court placed the exemption of the master from liability for injuries negligently caused by one servant to another in the same employment upon the ground that there was a joint undertaking on the part of the several agents or servants engaged by the master, where each one stipulated for the performance of his several part; that they were not liable to the master for the conduct of each other, nor was the master liable to one for the conduct of another; and that, as a general rule, where there was no fault in the owner, he was only liable to the servant for his wages.

In the Massachusetts case the court placed the exemption of the company on the ground that the contract of the servant implied that he would take upon himself the risks attending the performance of the service which he had contracted to perform; that those included the injuries which might befall him from the negligence of fellow servants in the same employment. Such exemption of the master was said to be supported by considerations of policy. The court said in its decision, and in defense of policy as a consideration for the rule: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the

<sup>1</sup> 4 Metc. (Mass.) 49.

<sup>2</sup> 1 McMul. 385.

care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." To the argument that the rule and reasoning ought not to apply where two or more are engaged in different departments of duty, where one could in no manner exercise control of or influence the conduct of another, the court said: "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty. It would vary with the circumstances of each case. The master is not exempted from liability, in such case, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand in the relation of a stranger, but is one whose rights are regulated by contract, express or implied."

From the reasoning and decision of the court in this case has developed to a very large extent the doctrine established in the different states. Some courts have followed its reasoning; others only in part. The differences



have become so great that a decision made in any one state is valueless as an authority in another, unless the same rule has been established in each. Therefore the practitioner must look not for a rule, but rather must inform himself what the courts of the particular state have established as a rule.

The doctrine so firmly established in Ohio is not recognized by the courts of Massachusetts. In a recent case the court say: "It is well settled in this commonwealth and in Great Britain that the rule of law that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of fellow servants is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the injured servant." <sup>3</sup>

<sup>3</sup> Holden v. Fitchburg R. R., 120 Mass. 271-273.

Passenger conductor and a switch tender. Farwell v. Railway Co., 4 Metc. (Mass.) 49. Brakeman and brakeman acting as conductor. Hayes v. Railway Co., 3 Cush. 270. Superintendent of corporation and operatives. Albro v. Agawam Canal, 6 Cush. 75. Laborer on roadbed and conductor. Gillshannon v. Railway Co., 10 Cush. 228. Car repairer and switchman. Gilman v. Railway Co., 10 Allen, 233. Sewer laborers under same general superintendence. Johnson v. Boston, 118 Mass. 114; Zeigler v. Day, 123 Mass. 152. Foreman and laborers. O'Connor v. Roberts, 120 Mass. 227. Roadmaster and engineer. Walker v. Railway Co., 128 Mass. 8. Trench digger and city superintendent. Flynn v. Salem, 134 Mass. 351. Car inspector and brakeman. Mackin v. Railway Co., 135 Mass. 201. Employé making ordinary repairs on a machine and operative of such

Nor are they in harmony with the New York courts in the classification of work into different departments or employments, and, with possibly one exception, refuse to recognize the distinction, so clearly made and sustained by the New York courts, that the furnishing and maintaining of appliances is a duty of the master which he cannot delegate, so as to relieve him from responsibility in cases of injury to an operative caused by the negligence of a servant in performing such duties of the master, while, as to the use of such appliances, the master's duty is performed when he has selected fit and competent servants to operate them, or used reasonable care to that end.<sup>4</sup> They adopt, for the rule which they claim to have established, the reasons that were stated by the English court in the cele-

machine. *McGee v. Boston Cordage Co.*, 139 Mass. 445, 1 N. E. 745. Switch hand and section boss. *Clifford v. Railroad Co.*, 141 Mass. 564, 6 N. E. 751. Mate and common seaman. *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517.

The rule is that a master is not liable to one servant for the negligence of another, notwithstanding that the latter is a superior servant, and has control over the other. *Moody v. Hamilton Manuf'g Co.*, 159 Mass. 70, 34 N. E. 185.

Where it was the duty of an engineer upon a vessel to repair appliances furnishing electric light, and his neglect so to do is alleged as the cause of a workman's injury, they are fellow servants. *Mellen v. Thomas Wilson Sons & Co.*, 159 Mass. 88, 34 N. E. 96.

The fact that the superintendent, after having negligently directed the work, assisted in its performance, does not affect the question of the master's liability. *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83.

Brakemen and the men who make up trains are fellow servants; and where a pin was used which was too short, when a pin of proper length was at hand, easily to be obtained, the act was that of a fellow servant, and not the act of one representing the master. *Thyng v. Railway Co.*, 156 Mass. 16, 30 N. E. 169.

<sup>4</sup> *Holden v. Fitchburg R. R.*, 129 Mass. 274.

brated case of *Wilson v. Merry*,<sup>5</sup> as follows: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master, in that which he (the master) has contracted or undertaken with the servant to do. The master has not contracted or undertaken in person to execute the work connected with his business. But what the master, in my opinion, is bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do, and to furnish them with adequate materials and resources for, the work. When he has done this, he has, in my opinion, done all that he is bound to do; and if the persons so selected are guilty of negligence, this is not the negligence of the master." Yet they say: "If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work."<sup>6</sup>

One would naturally infer from this language that it was designed to state a similar rule to that of New York as to the master's duties that were personal to him, and which he could not delegate so as to relieve him from responsibility for their negligent performance, and more especially from what was said in *Ford v. Fitchburg R. R.*:<sup>7</sup> "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied upon, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty

<sup>5</sup> L. R. 1 H. L. 332.

<sup>6</sup> *Holden v. Fitchburg R. R.*, 129 Mass. 274.

<sup>7</sup> 110 Mass. 240.

to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequences of the agent's negligence, if the servant is injured; in the other, he may." Yet such is not the rule.

The language thus used in the foregoing cases has been a source of much perplexity to the courts of that state. They have sought to excuse it in *Johnson v. Boston Towboat Co.*,<sup>8</sup> and in subsequent cases. Their efforts in this direction have been simply to impair the force of those decisions, and to envelop the whole subject in that state with a mist that is hard to dispel. So long as *Ford v. Fitchburg R. R.* remains disapproved in express terms, so long will there remain doubt and uncertainty upon the subject in that state.

Going back to *Farwell v. Boston & W. R. R.*, *supra*, the learned chief justice evidently feared that the language used might be construed too generally, and to embrace a class of cases or doctrines that he did not feel fully prepared to decide. So he stated: "We are far from undertaking to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or managing agent, in case of an incorporated company,—are questions upon which we give no opinion."

<sup>8</sup> 135 Mass. 200.

The same court said, in *King v. Railway Co.*:<sup>9</sup> "If a corporation itself should be held responsible to its servants that the road when first used was safe and sufficient, yet keeping the road in repair afterwards would seem to be the work of laborers and servants as much as any other part of the business of the corporation."

If it were not for the fact that the defect in the appliance in *Ford v. Fitchburg R. R.* was its want of repair and worn-out condition, it might be said that the language there used applied to furnishing the appliances in the first instance, and that the rule in Massachusetts therefore is that, as to furnishing in the first instance appliances and structures for use by the servants, it is the master's duty, which cannot be delegated so as to relieve him from responsibility for an injury caused by a want of proper care on the part of any of his servants clothed with his duty in this respect; but, as to maintaining them in suitable condition and repair, all who are thus engaged, in common with those whose duty it is to use such appliances, are fellow servants, with the probable exception of the relation of a foreman in this branch of the business, who has charge of the repair of the means and appliances, and whose duty it is to see they are properly made. Yet it is not every foreman in charge of repairs that comes within the exception, and I know of no rule sufficiently established by which a line can be drawn. A master mechanic, as we have seen, is within it; a roadmaster is not.<sup>10</sup>

This statement of the rule finds support in the opinion of Cobourn, J., in *Lawless v. Railroad Co.*,<sup>11</sup> when he says: "It was the duty of the defendant to furnish a locomotive engine suitable for the work which it required the plaintiff

<sup>9</sup> 9 Cush. 112.

<sup>10</sup> *Walker v. Railway Co.*, 128 Mass. 8.

<sup>11</sup> 136 Mass. 1.

to perform with it, and to exercise ordinary care in the performance of this duty; and it was responsible to the plaintiff, if he was using due care, for an injury resulting from its negligence and want of ordinary care in this respect. It did not necessarily discharge this duty by intrusting it to suitable servants and agents, but was responsible for the negligence or want of ordinary care of such servants and agents in the performance of the duty required of them. Such servants or agents, in the performance of this duty, were not fellow servants of the plaintiff, but were charged with the duty required of the defendant." The defect there complained of was one in the connecting appliance of an engine.

In *Johnson v. Boston Towboat Co.*<sup>12</sup> the court lay down the following as a statement of the rule: "When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means provided, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business is engaged in the common service. Thus, a person charged with the duty of keeping a railway track in repair, etc."

It would seem to follow that even a master mechanic, as to some repairs, would be deemed a fellow servant; that, in order to be exempt as such, the duty with which he was charged, and which was violated, must relate to a

<sup>12</sup> 135 Mass. 211.

practical reconstruction of the machine,—otherwise, we cannot reconcile *Ford v. Fitchburg R. R.* with the language used above, or with other cases. *Holden v. Fitchburg R. R.* was decided solely upon the ground that the derrick had lain beside the track so long that the company was presumed to have notice of it. No question of fellow servant, though discussed, was involved.

In the more recent case of *Moynihan v. Hills Co.*<sup>18</sup> an attempt is made by the court to state definitely the rule in that state. The task was a difficult one, in view of *Ford v. Fitchburg R. R.*, without which it would have been comparatively an easy one. After repeating that the relations between the master and the servant, and their rights, depend upon contract, they state:

“In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, so far as the exercise of proper care on his part will secure them; and the servant agrees to assume all the ordinary risks of the business, and, among them, the risk of injury from negligence of his fellow servants. The obligation which the master assumes is personal, and pertains to him in his relation to the business as proprietor, and in his relation to the servant as master. It has been repeatedly held that he cannot discharge it by delegating the performance of his duty to another, and, if he employs servants or agents to represent him in the performance of this duty, they are to that extent agents or servants, for whose conduct he is responsible. The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow serv-

<sup>18</sup> 140 Mass. 586. 16 N. E. 574.

ant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the conditions as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servant for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him to reasonably protect his servant from dangers which he should prevent. It is obvious that different questions arise, in cases of this kind, in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to safety is constantly changing with the use of it; and it is safe or unsafe at a given moment, according as it is properly or improperly used and managed by the person who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed to have contemplated that, to a certain extent, fellow servants would be employed by the master to do work in keeping the machinery safe. Work negligently done in that field, if an accident should happen from it, would seem, at first, to introduce a conflict between the obligations of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from the negligence of a fellow servant. It becomes necessary, therefore, to consider the rights of the parties in such cases.

“The application in each particular case of any general rule which may be laid down will involve a consideration of



two questions of fact: First. What is the nature and character of the business, and the usual and proper method of conducting it? Secondly. In such a business, what is reasonably necessary to be done, on the part of the master, to secure for the use of the workman machinery and appliances which will always be reasonably safe?

“First. There is that class of cases in which the condition of a machine, as to safety, is constantly changing with its use, so as to require from a person tending it, as a part of the ordinary use of it, reconstruction or adjustment of its parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employés, negligence of a fellow servant. So far as the condition of the machine depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work.

“A second class of cases includes those in which repair or reconstruction of a machine is necessarily of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow servants of the employé, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of the work, for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care.” (Though this language is very indefinite, I assume it means that the servant in charge is chargeable with any defects

that are due to his want of care in inspection, test, or directions, or want of skill, and which would not have happened, or would have been discovered by him, if in the exercise of ordinary care.) "And so he is bound to bring to this department of his business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom, in an important particular, the safety of others is intrusted; and he is also bound to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow servant with his other employés, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable.

"There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might have men and privileges in a machine shop in a distant city, and build it there. His servants in that work would not be fellow servants with an employé engaged in an entirely different business, and under the doctrine of 'respondeat superior' he would be held liable for the consequences of their negligence. If he saw fit to construct it, or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. It is believed that the decisions in every case in this commonwealth founded upon alleged negligence of a master in relation to his machinery, tools, or appliances will be found,

upon the view of the facts taken by the court, to be governed by the principles which we have stated."

There is a duty of supervision over premises and appliances furnished for the use of employés which is personal to the master, and to whatever employé this duty is delegated he presumedly represents the master in the performance thereof. The duty and the rule are thus stated in *Babcock v. Railway Co.*:<sup>14</sup> "It is the duty of a railroad company to use reasonable care and diligence to keep its tracks in a safe condition for its employés to work upon. So far as keeping its tracks in repair is left to its servants, it is its duty to exercise reasonable supervision to see that the work intrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed, and the domain which may be left to servants is entered, depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools, and appliances for his employés. In some cases this may be a difficult question to decide. But undoubtedly a jury may find that a railroad corporation should so far supervise the work of its servants in repairing its tracks as to see that a pile of sleepers three or four feet wide is not left for a long time within eighteen inches of the rails in the freight yard of an important station. The condition of the road, under the circumstances shown, was evidence of negligence of the defendant corporation."

The rule is thus stated in *Rogers v. Ludlow Manuf'g Co.*:<sup>15</sup> "It is the duty of the master to exercise a reasonable supervision over the condition in which the machinery, structures, and other appliances used in his business are kept

<sup>14</sup> 150 Mass. 470, 23 N. E. 325.

<sup>15</sup> 144 Mass. 204, 11 N. E. 77.

by his servants; and he cannot wholly escape responsibility by delegating the performance of this duty to servants. The negligence of his servants in repairing, or in failing to repair machinery, is not necessarily the negligence of the master; but it is also to be determined in each case whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing his machinery is kept in proper condition, although he may have employed competent servants, and provided them with suitable materials, and instructed them to keep the machinery in repair. We are aware that this rule is somewhat indefinite, and is perhaps not precisely that which generally prevails in the United States.

*The Massachusetts Statute (Chapter 270, Laws 1887).\**

Section 1. Where, after the passage of this act, personal injury is caused to an employé, who is himself in the exercise of due care and diligence at the time: (1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; (2) by reason of negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole

\* The first section and clause of the statute is not a bar to an action at common law for personal injuries caused by a defect, therein named, for which such an action might have been maintained before the passage of that statute. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766.

A weaver who operates a loom is not a person intrusted with and exercising superintendence, whose sole and principal duty is that of superintendence, within the statute, merely because it is also his duty to notify the loom fixer to repair when the loom is out of repair. *Roseback v. Actna Mills*, 158 Mass. 379, 33 N. E. 577.

duty is that of superintendence; (3) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive, engine, or train upon a railroad,—the employé, or, in case the injury result in death, the legal representatives of such employé, shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of, nor in the service of, the employer, nor engaged in its work.

Sec. 2. Where an employé is instantly killed, or dies without conscious suffering, as the result of the negligence of the employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased or, in case there is no widow, the next of kin, provided that such next of kin were, at the time of the death of such employé, dependent upon the wages of such employé for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

Sec. 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employés of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 5. An employé or his legal representatives shall not be entitled, under this act, to any right of compensation or remedy against his employer in any case where such employé knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

**THE RULE IN OHIO.**

The supreme court of Ohio was among the earliest courts to adopt the rule of superior and subordinate. Until the decision of *Chicago, M. & St. P. Ry. Co. v. Ross* by the federal court, the courts of Ohio and Kentucky stood practically alone in the application of this doctrine to its full extent, as determining the question of who are fellow servants. This doctrine was first announced in *Little Miami R. Co. v. Stevens*,<sup>16</sup> and subsequently in *Cleveland, C. & C. R. Co. v. Keary*.<sup>17</sup> It received full expression in the following forcible language: "From the very nature of the contract of service between the company and the employes, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. For this purpose the conductor is employed, and in this indirectly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives depend upon his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that

<sup>16</sup> 20 Ohio, 415.<sup>17</sup> 3 Ohio St. 201.

does not admit a common participation, and no servants are fellow servants when one is placed in control over the other."

It was further said by the same court in a more recent case: He [the employer] also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow servant or not, in the ordinary sense. The superior in his relation to the subordinate servant is the alter ego of the master. This doctrine, which imputes to the master the negligence of a servant to whom he has delegated authority over other servants, has been firmly ingrafted in the jurisprudence of this state ever since the case of *Little Miami R. Co. v. Stevens*.<sup>18</sup> "Where the master, or one placed by him in charge of men engaged in his service, personally assists or interferes in the labor performed under his direction and control, and is, while performing such labor or interfering with its performance, guilty of negligence resulting in injury to one engaged in such service, there is no sound principle of law that will excuse or exonerate the master from liability. \* \* \* The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow servant, has no application when the servant by whose negligent conduct or act the injury is inflicted sustains the relation of superior in authority to the one receiving the injury. \* \* \* The fact that the foreman is performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in no wise relieves the master from liability. \* \* \* The negligent act, although committed by the

<sup>18</sup> 20 Ohio, 415.

hand of another, in such case is in law the act of the foreman, and consequently the act of the master."<sup>19</sup>

The doctrine of the Ohio court recognizes the rule that it is the duty of the master to exercise reasonable care in providing safe machinery and appliances for the use of his employes. He is bound to vigilance, but vigilance is the maximum of his duty. Reasonable care is required in the employment of careful and competent servants, but the exercise of reasonable care by such servants is at the risk of their fellow servants. When the master has performed the duty of exercising such reasonable care in the selection of competent servants to construct or maintain in repair such machinery or appliances, his duty to other operatives who are to use them is fully met and performed.<sup>20</sup>

<sup>19</sup> *Berea Stone Co. v. Kraft*, 31 Ohio St. 291.

<sup>20</sup> *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 324.

Brakeman and conductor are not fellow servants. *Lake Shore & M. S. Ry. Co. v. Spangler* (Ohio Sup.) 8 N. E. 467.

Conductor and trackman are not fellow servants. *Dick v. Railway Co.*, 38 Ohio St. 389.

Brakeman and car inspector are fellow servants. *Little Miami Ry. Co. v. Fitzpatrick*, 42 Ohio St. 318.

Foreman in charge of hands repairing freight cars is not a fellow servant with subordinate in respect to the work being done at the time of injury. *Lake Shore & M. S. Ry. Co. v. Lavalley*, 36 Ohio St. 221.

When a sectionman had returned from his work on a construction train, and had deposited his tools and started for home, and, in attempting to cross the track, was injured by such train moving backward, it was held he was not at such time a fellow servant of the trainmen. *Columbus & T. Ry. Co. v. O'Brien*, 4 Ohio Cir. Ct. R. 515.



## CHAPTER XIV.

### FELLOW SERVANTS (Continued).

#### THE RULE IN MICHIGAN.

The test of the existence of the relation is a common employment, p. 268.

Difference in grade or department is immaterial, p. 268.

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It is otherwise with a servant charged with a special authority and supervision in respect to a particular part of the work, p. 270.

The rule does not apply where a servant is sent by a superior servant into a dangerous place, or exposed to a risk not assumed, pp. 271, 272.

Servants furnishing appliances and keeping premises in repair not fellow servants of those using them, pp. 272, 273.

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#### THE RULE IN CALIFORNIA.

The question is regulated by the Code, but its provision is said to follow the common law, p. 275.

No distinction in grade is recognized, p. 275.

#### THE RULE IN INDIANA.

The master cannot delegate to a servant his duty to provide safe premises and appliances; and, if he does so, he is liable for the servant's acts or negligence, p. 277.

But he is not liable for the acts or negligence of a servant acting as such, p. 278.

He cannot delegate the duty to inspect and repair, pp. 278, 283.

The rule as to foreign cars an exception to the general rule, p. 279.

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A foreman is a fellow servant, except where the master's duties are delegated to him, pp. 282, 283.

#### THE RULE IN NEW HAMPSHIRE.

A servant or agent to whom is delegated the master's duty to provide suitable machinery and appliances is not a fellow servant, p. 284.

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The rule as to repairs depends on the circumstances; in some cases the duty may, while in others it may not, be left to servants, p. 284.

The test is whether the offending servant represented the master in the responsibility or performance of any duty the latter owed, p. 285..

#### THE RULE IN CONNECTICUT.

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The master cannot delegate his duty to furnish safe premises, machinery, and appliances, and to maintain them in proper condition, p. 286.

The rule as to those using such premises, machinery, and appliances is broader than the Massachusetts doctrine, and makes allowance for emergencies, p. 287.

The extent to which a servant having supervision is regarded as a fellow servant, p. 289.

### THE RULE IN MICHIGAN.

The general rule as stated in Thompson on Negligence was approved in Michigan: "All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants."<sup>1</sup>

The court say, in *Adams v. Iron Cliffs Co.*: "Nor does it make any difference that the servant guilty of the negli-

<sup>1</sup> *Adams v. Iron Cliffs Co.*, 78 Mich. 288, 44 N. W. 270; *Smith v. Potter*, 46 Mich. 263, 9 N. W. 273.

The founder in a blast furnace, having charge of the inside work therein, is a fellow servant of the engineer of the locomotive used in moving cars on the premises. *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270.

Where an employer furnishes suitable materials and employs competent workmen to construct a scaffold to be used in putting on a cornice, and the same scaffolding is subsequently used by painters, the carpenters and painters are fellow servants. *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15.

Where the train dispatcher has absolute control of the running of its trains, he is not a fellow servant of those operating trains who are subject to his directions. *Hunn v. Railway Co.*, 78 Mich. 513, 44 N. W. 502.

A car inspector is not the fellow servant of a brakeman. *Morton v. Railway Co.*, 81 Mich. 423, 46 N. W. 111.

A section hand is a fellow servant with a conductor and engineer. *Harrison v. Railway Co.*, 79 Mich. 409, 44 N. W. 1034.

Inspectors of premises and machinery are not fellow servants of other employes. *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572.

One to whom the master gives the entire charge of selection of materials and construction of a runway for coal, and who employs and directs the employes using it, is a vice principal. *Brown v. Gilchrist*, 80 Mich. 56, 45 N. W. 82.

A mill foreman, whose duty it is to keep the machinery in repair,

gence is a servant of superior authority, unless such superior servant arises to the grade of the alter ego of the master."

The rule stated is sometimes applied in this state with extreme liberality. It was held that a servant who worked in the sawmill of a company was a fellow servant of men

is not the fellow servant of those who use it. *Roux v. Lumber Co.*, 94 Mich. 607, 54 N. W. 492.

An assistant roadmaster, in control of a gang of men, and with power to direct their work and discharge any of them, is a superior, and not a fellow servant with such. *Palmer v. Railway Co.*, 93 Mich. 363, 53 N. W. 397.

A yardmaster, having power to hire and discharge men, and assign and direct their work, is not a fellow servant with a switchman. *Lyttle v. Railway Co.*, 84 Mich. 289, 47 N. W. 571.

Where it is the duty of a sawmill hand to go down under the band saw when the machinery is not in motion, and clean out the sawdust, such employé is the fellow servant of the engineer, who may start the wheel and cause him injury. *Bergstrom v. Staples*, 82 Mich. 654, 46 N. W. 1035.

The master's servants engaged in digging a trench in his lumber yard, and other employés engaged in handling lumber therein, are not fellow servants. The former are performing a master's duty as to premises. *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598.

Brakeman and conductor are fellow servants. *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273.

Brakeman and employé loading cars are fellow servants. *Day v. Railway Co.*, 42 Mich. 523, 4 N. W. 203.

Where the employer furnishes sufficient sound appliances for doing the work, he is not responsible for the selection of a faulty one by a servant, whereby another is injured. *Kehoe v. Allen*, 92 Mich. 464, 52 N. W. 740.

Where a servant unnecessarily used a defective tool, others not defective being furnished, by which an employé was injured, the offending and injured employés were fellow servants. *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350.

in charge of the warehouse kept for the storage of salt. It appeared in that case that the sawmill and salt block were operated in conjunction, but the business of one was really separate from the other.<sup>2</sup>

Where the servant selected by the master has full charge over the work and the men employed thereon, and his agency covers the whole work, and his capacity and discretion dominate over it, then, in respect to his legal accountability, he stands in the shoes of his principal; and his negligence, in such case, is imputed to the master, so as to make the latter responsible to a servant employed under such superintendent for an injury occasioned thereby.<sup>3</sup> And if it becomes necessary to intrust the duty of the employment and retention of servants—which duty the law imposes upon the master—to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of the principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of the business. In other words, while the servant assumes the risk of the negligence of fellow servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority.<sup>4</sup>

The fact that a servant is charged by the master with special duties, and has special authority in respect to a particular part of the work, in whom is vested supervision over it, and whose duty it is to see that it is done, does not change his relation to the other employes as a fellow servant, nor does it place him, in respect to the master, in the position of superintendent or manager, in the sense to

<sup>2</sup> *Sell v. Lumber Co.*, 70 Mich. 479, 38 N. W. 451.

<sup>3</sup> *Slater v. Chapman*, 67 Mich. 526, 35 N. W. 106.

<sup>4</sup> *Quincy Min. Co. v. Kitts*, 42 Mich. 39, 3 N. W. 240.

make the master responsible for injuries to a servant resulting from his negligence.<sup>5</sup>

If the manager has general control and supervision, and his capacity and discretion dominate, then it is not material whether he received his appointment directly from the master, or whether he received it through an agent of the master. The point is, what, as matter of fact, was his position? not by what direction or circuitry did he get it?<sup>6</sup>

In this state the extreme of the rule is applied where the servant is sent into a dangerous place, or exposed to a risk not connected with his employment, and in consequence receives injury. The rule which exempts the master from responsibility has no application, because the risk is not one which the servant has assumed. It is argued that if, instead of being sent by the master in person, the servant is thus wrongfully exposed to danger by one whom the master has placed over him, and to whose orders he is subjected, the responsibility is the same; the wrongful act of the superior being in law the wrongful act of the master himself. The fact that the servant is under no obligation to obey the order does not change the rule, if the order itself was not an unreasonable one, in view of the circumstances; nor does the fact that the order was in excess of the authority conferred upon the superior by the master, when it is given in furthering the master's interests, and the master receives the benefit of the act, if any. The master fixes the limits of his agent's authority, and it is his duty to keep him, in what is done by him, within the limits fixed. The injured party could not always be expected

<sup>5</sup> *Quincy Min. Co. v. Kitts*, 42 Mich. 39, 3 N. W. 240; *Ryan v. Bagaley*, 50 Mich. 180, 15 N. W. 72.

<sup>6</sup> *Ryan v. Bagaley*, 50 Mich. 180, 15 N. W. 72.

to know whether it was or was not without express sanction.<sup>7</sup>

It is unnecessary to state that some portions, at least, of the rule as above stated, have not found support in other states. It, however, must be considered as settled in Michigan that their rule of fellow servants has no application when the servant is performing duties outside of the scope of his employment, or when he is sent into a dangerous place, or exposed to extraordinary perils.

We have heretofore discussed the doctrine as held by the courts of this state as to the relation servants engaged in the furnishing and repair of appliances and machinery bear to those engaged in their use; and we found the rule well settled that those who were engaged in the purchase or furnishing of appliances in the first instance, who were selected by the master, without reference to rank or grade, represented the master, and were not engaged in the same common employment with operatives.<sup>8</sup>

The supreme court in recent cases approve of the language used in *Sadowski v. Car Co.*,<sup>9</sup> and apply the rule there so well stated, that those engaged to provide and keep in repair the place, or supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when so provided.<sup>10</sup> In such cases the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such sense that the latter is liable for his negligence. This language was used with ref-

<sup>7</sup> *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 210.

<sup>8</sup> *Fox v. Iron Co.*, 89 Mich. 393, 50 N. W. 872; *Sadowski v. Car Co.*, 84 Mich. 106, 47 N. W. 598.

<sup>9</sup> 84 Mich. 106, 47 N. W. 598.

<sup>10</sup> *Roux v. Lumber Co.*, 94 Mich. 607, 54 N. W. 492.

erence to a foreman of a mill, whose duty it was to have fixed covering over gearing out of repair.

It will be observed that the court in this case, as in former ones, by the language used, confines the master's duty to supplying machinery and tools, and does not mention their repair, while as to premises it expressly refers to keeping them in repair. The general language used, adopting the rule as to separate and distinct employments, and approving of the doctrine as stated in *Northern Pac. R. Co. v. Herbert*,<sup>11</sup> ordinarily would be sufficient to indicate that the rule of the federal court as to those engaged in repairs was fully approved. This view is strengthened by what was said and held in *Ashman v. Railway Co.*,<sup>12</sup> that those to whom is intrusted the keeping of premises in repair represent the master. This was said with reference to blocking frogs. It was further said that the master's duty in this respect is not performed by providing suitable materials and the employment of competent servants to do the work; yet some doubt was left from the circumstance that *Ford v. Fitchburg R. Co.*<sup>13</sup> was approvingly cited, as sustaining the views of the court. The language of that case might sustain the position of distinct employments; yet, as has been fully shown, the case does not, nor is such the doctrine of Massachusetts.

The doubt upon the precise question is intensified by the rule stated in *Hoar v. Merritt*:<sup>14</sup> "Having used ordinary or reasonable care in the selection of competent and trustworthy men, and furnished them with suitable means to perform the services in which he employed them, he is not answerable in damages for an injury received by a servant in consequence of the negligence of his fellow servants while engaged in the

<sup>11</sup> 116 U. S. 653, 6 Sup. Ct. 590.    <sup>12</sup> 110 Mass. 240.

<sup>13</sup> 90 Mich. 567, 51 N. W. 645.    <sup>14</sup> 62 Mich. 390, 29 N. W. 15.



same service." This case has not been overruled or criticised, and, when we consider it in connection with the guarded language used in recent cases, we might conclude, if it were not for what was said in *Van Dusen v. Letellier*<sup>15</sup> and *Dewey v. Railway Co.*,<sup>16</sup> that, so far as repairs to machinery and appliances are concerned, the rule in Michigan is that those engaged in making them are fellow servants with those who use them, with the possible exception of the foreman in charge, whose duty it is to see that they are made, who may be held to represent the master. This view is in some respects in accord with what was actually decided in *Ford v. Fitchburg R. Co.*, and what is held to be the rule in Indiana.

It is difficult to reconcile all the decisions in this state upon this subject. In *Michigan Cent. R. Co. v. Austin*<sup>17</sup> it was held that a trackman, whose duty was working upon the track, was a fellow servant with operatives; and in *Smith v. Potter*<sup>18</sup> it was held that a car inspector was a fellow servant with operatives; while in *Morton v. Railroad Co.*<sup>19</sup> an inspector of chains represented the master; and in *Van Dusen v. Letellier*<sup>20</sup> an inspector of premises represented the master. The former cases, apparently in conflict with the latter, are nowhere disapproved or overruled; yet is stated for the first time in the latter case that the duty of the master as to repairs of machinery is the same as to the condition of his premises, from which it follows that the doctrine of former cases is overruled.

<sup>15</sup> 78 Mich. 502, 44 N. W. 572.

<sup>16</sup> (Mich.) 52 N. W. 942.

<sup>17</sup> 40 Mich. 247.

<sup>18</sup> 46 Mich. 258, 9 N. W. 273.

<sup>19</sup> 81 Mich. 433, 46 N. W. 111.

<sup>20</sup> 78 Mich. 502, 44 N. W. 572.

**THE RULE IN CALIFORNIA.**

The question of fellow servants is regulated in this state by a provision of the Code<sup>21</sup> which provides as follows: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé."

The decisions are based upon this provision, which the courts hold is but a declaration of the common law. It recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury comes is the superior of the servant injured in the general service in which they were in common engaged.<sup>22</sup>

It has been thought that the foregoing doctrine was modified, at least, by the decisions of the court in *McKune v. Railway Co.*<sup>23</sup> and *Beeson v. Green Mountain G. & M. Co.*<sup>24</sup> There is nothing in the facts of those cases, or in the points actually decided, to justify such belief; yet there was that in the language used which might mislead in support of the view that the rule was modified. For instance, in *McKune v. Railway Co.* the court said: "We think that the jury were justified in concluding that the facts presented a case where a laborer, placed by the company under the direction

<sup>21</sup> Section 1970.

<sup>22</sup> *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 258.

<sup>23</sup> 66 Cal. 302, 5 Pac. 482.

<sup>24</sup> 57 Cal. 20.

of a foreman, and while acting under such direction, in the ordinary pursuit of his labor for the company, was injured by an occurrence caused by the company, and that the company alone was guilty of negligence." The facts in the case were that the train dispatcher and material agent of the defendant negligently sent out an extra train, which collided with the plaintiff, a track laborer, while riding on a hand car. The court merely decide that such train dispatcher was not a fellow servant with the plaintiff; that he represented the defendant. He was a vice principal, employed and discharged men, and directed the movement of the trains. When he directed the extra train to go upon the road, the defendant directed it.

Beeson v. Green Mountain G. & M. Co. was decided upon the principle of the master's duty to furnish safe appliances. It was there held that as the master was bound to furnish employes safe materials and structures, and keep the same in repair, this obligation could not be delegated to another, so as to relieve the master from responsibility for an injury resulting to a servant caused by the negligence of one to whom this duty had been delegated. It was also stated by the court: "Whenever the nature of the business is such as to involve the appointment of subalterns by middlemen, and to withdraw the principal from the management of the business, then the principal is liable for the negligence of the middleman in making the appointments, on the ground that the negligence is that of the principal, and not of a fellow servant of the plaintiff."

All doubts upon the question, if any such were justified, were removed by the decision of the court in *Stephens v. Doe*,<sup>25</sup> where the court approve of the doctrine established in *McLean v. Blue Point Gravel Min. Co.*, and say that

<sup>25</sup> 73 Cal. 27, 14 Pac. 378.

under the provisions of the Code in question, as interpreted by them, "the master would not be responsible for the careless acts of a person, such as the foreman, who was employed in the same general business with the plaintiff, unless the defendant is shown to have neglected to use ordinary care in the selection of the foreman."

The distinction made by the federal court and the court of appeals of New York between those servants engaged in the supply and repair of appliances and those engaged in operating or using them is fully maintained. They are not engaged in the same common employment, and therefore are not fellow servants.<sup>26</sup>

In a recent case this rule was applied to the extent that a laborer who was employed to remove obstructions and snow from the track, and, while performing his duty, was injured by the negligence of a conductor, could not recover; which was based upon the distinction, generally recognized, that, when the employés engaged in performing the master's work are injured by other employés engaged in operating his appliances, they are fellow servants, as to the application of principles involving the master's liability; while, on the other hand, if the operatives receive injury through the neglect of those employed in performing the master's duty, the relation of fellow servant does not exist. In the one case, it is an injury to a servant caused by a servant; in the other an injury caused to the servant by the master.

#### THE RULE IN INDIANA.

It is the duty of the master to use ordinary care and diligence to provide safe working places, and safe ma-

<sup>26</sup> Beeson v. Green Mountain G. & M. Co., 57 Cal. 20; Trask v. Railway Co., 63 Cal. 96.

chinery and appliances, for those in his service. A neglect of this duty is an actionable wrong.<sup>27</sup>

This duty rests upon the master, and he cannot absolve himself from liability by delegating it to an agent, where the duty is one owing by the master, and he intrusts its performance to an agent; the agent's negligence is that of the master.<sup>28</sup> The negligence of a co-employé, or servant acting as such, will not authorize a recovery in any case, although the fellow servant or co-employé may be a superior officer, an agent, or foreman; but if the superior agent is charged with the performance of the master's duty, then, in so far as that duty is concerned, his acts and his negligence are the acts and the negligence of the master, and not simply those of a co-employé or fellow servant.<sup>29</sup>

The employer is required, not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonable and careful inspection and repair, as will keep the implements, which the employé is required to use, in such a condition as not unnecessarily to expose him to unknown and extraordinary hazards. The consequences of a negligent performance of that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employé who has suffered injury.<sup>30</sup>

<sup>27</sup> *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. 302; *Pittsburgh, etc., Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Indiana Car Co. v. Parker*, 100 Ind. 181.

<sup>28</sup> *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957.

<sup>29</sup> *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Capper v. Louisville, etc., Ry. Co.*, 103 Ind. 305, 2 N. E. 749; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Mitchell v. Robinson*, 80 Ind. 281.

<sup>30</sup> *Louisville, N. A. & C. Ry. Co. v. Buck*, 116 Ind. 506, 19 N. E.

In the case of *Louisville, N. A. & C. Ry. Co. v. Buck*<sup>81</sup> the court express approval of the language and doctrine stated in *Northern Pac. R. Co. v. Herbert*,<sup>82</sup> with the exception of its strict application to foreign cars. In such cases it is held that car inspectors are fellow servants of operatives

453; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 280.

A stone mason engaged in the construction of a bridge is a fellow servant of carpenters at work on same bridge. *Bier v. Railway Co.*, 132 Ind. 78, 31 N. E. 471.

Employés in a roundhouse, in whose charge the plaintiff, who was an inexperienced workman, was placed, and who ordered plaintiff to clean an engine, are fellow servants of such plaintiff, and so is the engineer in charge of such engine. *Spencer v. Railway Co.*, 130 Ind. 181, 29 N. E. 915.

A section foreman had full power to employ, and could discharge, track hands who worked under him. On taking his gang, at the close of the day, on a hand car, to the toolhouse, one of his men was injured through the negligence of the foreman in not properly applying the brake. Held, that, while the foreman was a vice principal in the matter of hiring and discharging the men, he was merely a fellow servant in transporting his men to and from their work. *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303.

A member of one section gang and the section boss of another, employed by the same company, are fellow servants. *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808.

A laborer employed on a construction train and the engineer thereof are fellow servants. *Evansville & R. R. Co. v. Henderson* (Ind. Sup.) 33 N. E. 1021.

A foreman or other like agent, except where the master's duties are delegated to him, is a fellow servant with those under his immediate control. *Capper v. Railway Co.*, 103 Ind. 305, 2 N. E. 749; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Railway Co.*, 18 Ind. 226; *Slattery v. Railway Co.*, 23 Ind. 81; *Ohio, etc., R. Co. v. Hammersley*, 28 Ind. 371; *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174; *Sullivan v. Railway Co.*, 58 Ind. 26; *Gormley v. Railway Co.*,

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<sup>81</sup> 116 Ind. 566, 19 N. E. 453.

<sup>82</sup> 116 U. S. 642, 6 Sup. Ct. 590.

of trains. The federal court has recently held the same. The reasoning is that, as to the property owned and furnished for use by a railroad company, it is its duty to furnish such, and such only, as are reasonably suitable and safe, and maintain the same in repair; while, as to foreign cars, they are not so furnished by the master, but he is un-

72 Ind. 31; *Robertson v. Railroad Co.*, 78 Ind. 77; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Drinkout v. Eagle Mach. Works*, 90 Ind. 423.

The same rule in other states held in *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Northcoate v. Bachelder*, 111 Mass. 332; *Zeigler v. Day*, 123 Mass. 152; *Blake v. Railway Co.*, 70 Me. 60; *McAndrews v. Burns*, 39 N. J. Law, 117; *Brown v. Railway Co.*, 27 Minn. 162, 6 N. W. 484; *Lehigh Val. Coal Co. v. Jones*, 86 Pa. St. 433; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. St. 374; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *Wright v. Railway Co.*, 25 N. Y. 562; *Crispin v. Babbitt*, 81 N. Y. 516; *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. 807.

Trackmen are fellow servants when injured by negligence of train hands. *Gormley v. Railroad Co.*, 72 Ind. 31. In other states: *Collins v. Railway Co.*, 30 Minn. 31, 14 N. W. 60; *Pennsylvania R. Co. v. Wachler*, 60 Md. 395; *Blake v. Railway Co.*, 70 Me. 60; *Schultz v. Railway Co.*, 67 Wis. 616, 31 N. W. 321; *Clifford v. Railway Co.*, 141 Mass. 564, 6 N. E. 751; *H. & T. C. Ry. Co. v. Rider*, 62 Tex. 267; *Van Wickle v. Manhattan Ry. Co.*, 32 Fed. 278; *Whaalan v. Railway Co.*, 8 Ohio St. 250; *Coon v. Railway Co.*, 5 N. Y. 492; *Sullivan v. Railway Co.*, 11 Iowa, 421; *Connelly v. Railway Co.*, 38 Minn. 80, 35 N. W. 582. Contra: *Howard v. Delaware & H. Canal Co.*, 40 Fed. 195.

A foreman of a railroad company, having exclusive charge of men under him, with full authority to direct where they shall work, is not their fellow servant. *Louisville, N. A. & C. Ry. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668.

The master mechanic in railway shops, with full authority over the men, machinery, and work, in the absence of one superior in authority, is not a fellow servant of such employes. *Taylor v. Railway Co.*, 121 Ind. 124, 22 N. E. 876.

Where the superintendent was present, and ordered a foreman to load stone in a certain car, and such car was started down a heavy

der obligation by law to receive them, and transport them over his road. His duty, as to such, is to make reasonable inspection;<sup>33</sup> and this duty is performed by the selection and employment of a sufficient number of competent and skillful inspectors. This is in accord with the rule, as stated ante, in other states.

While the doctrine has been so aptly and forcibly stated in the foregoing cases, yet its force is somewhat weakened by expressions in other cases. The fault lies in the tendency of most jurists, even where the Ohio rule of superior and subordinate is not recognized, to instinctively, so to

grade, coming in contact with other cars, which in turn were forced against a car upon which plaintiff was at work, it was held that the act was that of the superintendent, who was not a fellow servant. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

A foreman having exclusive charge of a gang of men, with full power to direct their movements and enforce obedience, is not the fellow servant of one ordered by him to work at a certain place, who is injured by another acting under the foreman's negligent direction. *Nall v. Railway Co.*, 129 Ind. 260, 28 N. E. 183, 611.

Where a foreman in the employ of a railroad company acts as a vice principal in calling out all its employes to avert the threatened destruction of a bridge in a freshet, he does not cease to be such vice principal, and become a fellow servant, as soon as he has assigned to the other employes a place to work, but retains his original character while directing the details of the work. *Id.*

If a master employs a superintendent, to whom is intrusted the control of the business and the other employes therein, he represents the employer, and his acts are the acts of the employer, and not those of a co-employe. *Mitchell v. Robinson*, 80 Ind. 281; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Railway Co.*, 111 Ind. 51, 11 N. E. 957; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380.

Car inspectors and brakemen are not fellow servants. *Ohio & M. Ry. Co. v. Percy*, 128 Ind. 197, 27 N. E. 479.

<sup>33</sup> *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318.



speak, assume that those whose duties are to direct and command represent the master, and attach some importance, at least, to that fact, where it exists. Thus we find it often referred to as if giving force to decisions distinctly made upon other grounds. For instance, in *Nall v. Railway Co.*<sup>34</sup> the court use the following language: "It is not easy to conceive how it can justly be asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distinct department, is no more than a fellow servant." They quote similar language which was used in *Taylor v. Railway Co.*<sup>35</sup> They state further, without reference to the offending servant being in charge of a separate department. "Nor can it be held, without infringing the principles of natural justice, that, if he who is authorized to give the command makes its execution unsafe, the employé whose duty it is to obey has no remedy for an injury received while doing what he is commanded to do." The offending servant whose conduct was in question was not in charge of a department; simply a foreman intrusted with the specific duty of protecting a bridge from destruction, threatened by an unusual freshet. The case was properly decided upon the ground that it was the master's duty to furnish a reasonably safe place for his servants to work, and that it was negligence to send an inexperienced man into a perilous place without giving him proper warning of its dangers; that the foreman, in these respects, represents the master. *Louisville, etc., Ry. Co. v. Graham*<sup>36</sup> was decided upon the same ground.

The doctrine as outlined above is closely in accord with the doctrine established in Massachusetts, where foremen

<sup>34</sup> 129 Ind. 260, 28 N. E. 183, 611.

<sup>35</sup> 121 Ind. 124, 22 N. E. 876.

<sup>36</sup> 124 Ind. 89, 24 N. E. 668.

who have in charge the furnishing of machinery or appliances, and their repair, in some instances represent the master, though, as to the use of such appliances and machinery, a foreman in charge is a fellow servant. Yet the rule is far more extended than in Massachusetts.

The rule proceeds upon the principle that such foreman directly represents the master in performing the master's duty, even as to the men subordinate to and acting under the command or directions of such foreman; and it will be found that all the cases have been decided upon this principle.

The rule is just as firmly established that for the negligence of a foreman, except where the master's duties are delegated to him, the master is not liable in damages to a servant injured thereby, but that such foreman is a fellow servant with those under his immediate supervision.<sup>37</sup>

The court, however, make a distinction where servants who are engaged in performing the master's duty, while at work, are being conveyed to and from their place of work upon the company's trains. In such case they are for the time being the fellow servants of the operatives of the trains.<sup>38</sup>

The doctrine is also firmly adhered to that all those who are engaged in supplying or keeping appliances, ways, or machinery in repair are engaged in a distinct employment or department of the master's service, and are not fellow servants with those engaged in operating or using them.<sup>39</sup>

<sup>37</sup> *Capper v. Railway Co.*, 103 Ind. 305, 2 N. E. 749.

<sup>38</sup> *Capper v. Railway Co.*, 103 Ind. 305, 2 N. E. 749; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 306; *Wilson v. Railroad Co.*, 18 Ind. 226; *Slatery v. Railroad Co.*, 23 Ind. 81; *Thayer v. Railroad Co.*, 22 Ind. 26; *Ohio, etc., Ry. Co. v. Hemmersley*, 28 Ind. 371; *Gorraley v. Railway Co.*, 72 Ind. 31.

<sup>39</sup> *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Louisville, N. A. & C. Ry. Co. v. Buck*, 116 Ind. 506, 19 N. E. 453.

It was held in *Columbus & I. C. R. Co. v. Arnold*<sup>40</sup> that a master mechanic, who had control of the engines and other machinery of a railroad company and the direction of the engineers and firemen, was a co-employé with them. The ruling in this case is not strictly in harmony with the general doctrine in that state; yet in the case of *Ohio & M. Ry. Co. v. Collarn*<sup>41</sup> it was practically approved. In the latter case it was held that such master mechanic was not the fellow servant of employes not operating engines or trains, where injury was caused to such employé by the neglect of an engineer, to this extent: that the master mechanic represented the master so far as notice of the incompetency of any such employé under his control was concerned, or of habitual neglect of duty, upon the ground that, where an agent of a corporation has the management or control of any matter, notice to the agent relating to such matter is notice to the principal.

#### THE RULE IN NEW HAMPSHIRE.

The doctrine in this state is very clearly stated by the court in the following language: "The rule of law which exempts the master from responsibility for injuries caused by the negligence of fellow servants does not relieve him from the duty which he owes to the servant to provide suitable and safe machinery and appliances for the use of the servant in his employment. This duty may be, and, in case the employer is a corporation, must always be, discharged by agents and servants; and the agent or servant charged with its performance, whatever his rank of service may be, stands in the place of the employer, who thereby becomes responsible for the acts, and chargeable with the negligence of, such agent or servant. In many kinds of service the care and keeping of tools and machinery in

<sup>40</sup> 31 Ind. 174.

<sup>41</sup> 73 Ind. 261.

a condition of safety requires merely the attention and repair occasioned by ordinary use and wear, and is properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such case the duty of the employer is performed by furnishing safe tools and machinery, and the means of making needed repairs; and the duty of making the repairs may be intrusted to servants, and any neglect in the performance of the service is the negligence of a servant. But in cases where practical knowledge and skill are required in keeping machinery in reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery, to protect the servant from injury; and for any failure to exercise proper care and skill, the employer is accountable. The question, who are fellow servants within the rule exempting the master? is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of servants are fellow servants, whatever their grade of service; and a servant, of whatever grade or rank, charged with the master's duty towards his servant, is, as to the discharge of that duty, a vice principal, for whose acts and neglect the master is responsible, because he has invested him with the responsibility of doing that which the master is bound to have carefully performed. The test is not whether they were engaged in a common employment, under the same general control, and paid by the same general principal, but whether the superior or offending servant represents the master in the responsibility or performance of any duty which it owed to the complaining servant." 42

<sup>42</sup> *Jacques v. Manufacturing Co.* (N. H.) 22 Atl. 552.

The doctrine thus expressed is very near the doctrine of Massachusetts. The department theory is not recognized, nor that of superior or subordinate. The character of the service or act performed determines the status of the offending service. All are fellow servants, without regard to the particular line of employment, except those engaged in supplying, in the first instance, the premises and appliances, and those whose duty it is to exercise skill and knowledge in determining the sufficiency and safety of repairs, other than such as are of an ordinary character, which are to be made by servants.

#### THE RULE IN CONNECTICUT.

The position of the supreme court of Connecticut is not defined with such exactness, upon all branches of this subject, that a clear and definite rule can safely be extracted. But very few cases involving the consideration of the question have reached that court,—a fact somewhat remarkable when we consider the extent and variety of the manufacturing industries in that state, and the further fact that her neighbor, Massachusetts, is prolific with cases in which the question is involved. The supreme court, in *Darrigan v. New York & N. E. R. Co.*,<sup>48</sup> reviews at some length the irreconcilable decisions of different states, and concludes that in respect to furnishing safe places for the employé to perform his work, and safe machinery and appliances for his use, and to maintain such in a reasonably safe condition for such purpose, these are duties of the master; adopting the New York rule to the extent, at least, that those who are engaged in this branch of the service are in the performance of a duty the master owes his servant, and that the negligence of any such servant, causing in-

<sup>48</sup> 52 Conn. 304.

jury to another engaged in their use, is imputed to the master.<sup>44</sup>

As to those engaged in the use of such premises, machinery, or appliances, this court declines to follow the rule of the Massachusetts court. That rule, they say, "unduly enlarges the exemption, and confines the liability of employers within too narrow limits. It does not sufficiently recognize the distinction between agents, managers, and even superintendents, on the one hand, and mere servants and common laborers, on the other; between duties which the master is required to perform and the work which is ordinarily performed by employés. It makes little allowance for emergencies, and does not sufficiently regard the obvious fact that cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which some one must be invested with a discretion and a right to speak and command in his name and authority. Such a right carries with it the corresponding duty of obedience. Some one must hear and obey. To make no discrimination, but in all cases to place those who are invested with authority to direct and control on the same footing with those whose duty it is merely to perform as directed, without discretion and without responsibility, seems to us unwise and impolitic."<sup>45</sup> The court, in the case referred to, held that the train dispatcher was not a fellow servant with those employed in operating a train on the defendant road; that there was a wide and manifest difference between the duties of such an agent and the duty of a locomotive engineer,—the duty of the former pertains to management, and that

<sup>44</sup> *Wilson v. Willimantic Linen Co.*, 50 Conn. 464.

<sup>45</sup> *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 304.

of the latter to obedience; that it was immaterial that those men are hired and paid by a common employer, and that their employment is designed to accomplish one common result.

The language used would hardly justify the inference that the court approved of the Ohio rule to the liberal extent that it now exists in that state, by which mere foremen and others of like character and authority, engaged in the mere direction and control of servants in doing some particular piece of work, are excepted from the class of fellow servants, but rather that they would consider them as fellow servants, notwithstanding their position, and the fact that to a certain extent they were in control of such servants, whose duty it was to obey their commands; that as to those who have control or management of the business, or of a department thereof, to whom the discretion of the master has been delegated, even though they are servants of the same master, engaged in the same common employment, they, in the performance of such duties as pertain to their position, represent the master, and in no sense are they to be considered as fellow servants of employes under their supervision and control,—for they say: “The train dispatcher, in respect to the matter of moving these trains, was supreme. The whole power of the corporation, whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name. The engineer was bound to obey his orders.”

The court, in a late case, recognize, as one of the duties to be performed by the master, that of bringing to the accomplishment of a dangerous work requisite skill and superintendence,—to provide and keep present one possessed of such, to superintend and direct the work,—and held, where one such was provided, who did not continue pres-

ent, exercising skill and knowledge in such direction and control, but temporarily left the direction thereof to one unskilled, whereby injury was caused to one of the workmen, the master was responsible in damages to him.<sup>46</sup> It was further held that the person so selected, under such conditions, was not a fellow servant, but represented the master; that the character of the work for which he was engaged determined his relation; and that the work of supervision, where skill and experience were required, was the work properly pertaining to the employer. Other questions are discussed, among them that of the furnishing of suitable materials for the work, from which the servants were to select such as were fit; yet this question only became important in connection with the question actually decided, it not being held that in a proper case, where the master had furnished such materials and sufficient competent servants, he would not have fully met his obligation.

In *Sullivan v. Railway Co.*<sup>47</sup> the court, in speaking of the position of a foreman, say: "If it is an act that the law implies a contract duty upon the part of the employer to perform, so that the person performing it is acting as vice principal quoad that particular act, then the latter is not a fellow servant of his co-laborers."

The rule in this state as to the person having supervision is very flexible. The court intends that it shall be so, as they stated in one of the cases under discussion that no general rule could be formulated so as to meet emergencies. They are at liberty to apply the condition of skill and experience to almost any piece of work, as well as to departments or branches of business. Such condi-

<sup>46</sup> *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094.

<sup>47</sup> 62 Conn. 209, 25 Atl. 711.



tions may be applied to conductors, bridge builders, sectionmen, and others in charge of work and the men employed, without reference to whether they have the discretion to employ or discharge men.

## CHAPTER XV.

### FELLOW SERVANTS (Continued).

#### THE RULE IN VERMONT.

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#### **THE RULE IN VERMONT.**

The courts of this state repudiate the rule established in Ohio and Kentucky so far as these states hold that the master is responsible for the negligence of a servant who has the right to command, and does command, an under servant, who is injured in the performance of such command or order negligently given. The supreme court say, in *Davis v. Central Vt. R. Co.*:<sup>1</sup> "This doctrine is not now generally recognized, nor would it seem to be a proper application of the general principles which all agree apply to the relation of master and servant in regard to injuries sustained by the latter in performing the service."

The English rule, formerly asserted by this court in *Hard v. Railway Co.*,<sup>2</sup> is disapproved, and the rule is established that the master does not fully perform his duty to provide a safe working place and machinery for his servant by employing competent workmen to furnish or construct them. If an expert, he must inspect their work; and if not, he must employ another competent person or expert for the purpose. If such, however, is his duty, he must not only see that the structure he provides is suitable at the outset, but that it is kept in repair; and the repairer's negligence in this respect is the master's negligence.

<sup>1</sup> 55 Vt. 90.

<sup>2</sup> 32 Vt. 477.

### THE RULE IN PENNSYLVANIA.

The supreme court of Pennsylvania thus state the rule: "The employment by the same master, engaged in the same common work, and performing duties for the same general purposes. To constitute such fellow servants, they need not at the time be engaged in the same particular work."<sup>3</sup> The rule thus stated is one laid down

<sup>3</sup> *Lewis v. Selfert*, 116 Pa. St. 628, 11 Atl. 514.

If the lack of sufficient water in the boiler was due to the negligence of the fireman, a fellow workman with the plaintiff, the employer is not responsible for the result of an explosion; and this, though there be evidence that there was a crack in the boiler, of which the defendant's superintendent had notice. *Mullen v. Filer*, 1 Lack. Jur. 33.

Where the proximate cause of the injury was the carelessness of the engineer in running his engine when dangerous, his employer is not responsible for injuries to a fellow workman by its breaking. *Philadelphia Iron & Steel Co. v. Davis*, 111 Pa. St. 597, 4 Atl. 513. This is contra to what was held in *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122, 39 N. W. 365.

A train dispatcher is not a fellow servant with a train employé. *Lewis v. Selfert*, 116 Pa. St. 628, 11 Atl. 514.

A boiler maker in the machine shop of a railroad company is not such a co-employé with the engineer of a locomotive as will relieve the company from his negligence in repairing the boiler. *Pennsylvania & N. Y. Canal & R. Co. v. Mason*, 109 Pa. St. 296.

To sustain the relation of fellow servants, it is not necessary that the two should be engaged in the same particular work; it is sufficient that the general scope of the employment is the same. *Lehigh Val. Coal Co. v. Jones*, 86 Pa. St. 432; *National Tube Works Co. v. Bedell*, 96 Pa. St. 175.

If at any time during the erection of machinery, around which the deceased was afterwards killed, he was engaged as one of the hands for its accomplishment, he and all those laboring with him, though coming from other shops, must be regarded as co-employés. It does not matter that he happened to be absent at the time the

by Shearman and Redfield in their excellent work on Negligence, and is often quoted by courts. This statement of the rule is so broad and general that it fails to express or define any particular doctrine or view upon this vexed question, and conveys to the reader but little information of the position assumed by the court. It is not exactly true that those servants who are employed by the same master, engaged in the common work, and

faulty piece was put in place. *Reading Iron Works v. Devine*, 109 Pa. St. 246.

If an employé be temporarily assigned to different duties, his new associates become his fellow servants for the time being. *McGrath v. Coal Co.*, 4 *Lancast. Law Rev.* 281.

A foreman whose authority is special, and not general, is a fellow servant of the employés under him. *Gerwig v. Folwell*, 13 *Wkly. Notes Cas.* 267.

A mining boss is a fellow servant of a miner. *Reese v. Biddle*, 112 Pa. St. 72, 3 *Atl.* 813; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364, 8 *Atl.* 593; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. St. 374; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *Haley v. Keim*, 151 Pa. St. 117, 25 *Atl.* 98.

He is a fellow servant with a driver boy employed to haul coal from the chambers of a mine. *Waddell v. Simoson*, 112 Pa. St. 567, 4 *Atl.* 725.

A locomotive engineer and a night telegraph operator and station agent are such co-employés that the company is not responsible for the death of the former by reason of the negligence of the latter. *Dealey v. Railroad Co.* (Pa. Sup.) 4 *Atl.* 170.

The boss of a railroad track gang is a fellow employé with one of the gang. *Shea v. Railroad Co.*, 36 *Pittsb. Leg. J.* 71; *Kinney v. Corbin*, 132 Pa. St. 341, 19 *Atl.* 141.

A car inspector is a fellow servant with brakemen. *Donaghy v. Railroad Co.*, 21 *Wkly. Notes Cas.* 154; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301, 13 *Atl.* 286.

A repairer of cars on the tracks in the yard and a brakeman employed as a car dropper are fellow servants. *Campbell v. Railroad Co.* (Pa. Sup.) 2 *Atl.* 489.

One who voluntarily, or under orders from another, assists the

performing duties for the same general purposes are fellow servants. They must be thus employed or engaged, and for the accomplishment of such results, in order to be thus classed as fellow servants; but many thus employed are not fellow servants. In some states the grade or rank distinguishes them, where the superior has authority to direct and control the subordinate. When such is not the case, the character and nature of the employment or act performed distinguishes them. Even in Pennsylvania, as we shall see, those who are engaged in furnishing machin-

defendant's servants in the performance of their duties, must be regarded as their fellow servant; and this, whether he be paid for his service or not. *Wischam v. Richards*, 136 Pa. St. 109, 20 Atl. 532.

Engineers of different locomotives in the employ of the same company are fellow laborers. *Keyes v. Pennsylvania Co.* (Pa. Sup.) 3 Atl. 15.

Foremen of machine shops and employés therein are fellow servants. *Faber v. Manuf'g Co.*, 126 Pa. St. 387, 17 Atl. 621.

It is only when the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, that the master is held liable for the negligence of such agent or subordinate. The latter must have a general power and control over the business, not a mere authority to superintend a class of work or a certain gang of men, in order to make the master liable. *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. St. 400, 4 Atl. 53; *Mullan v. Steamship Co.*, 78 Pa. St. 25.

The doctrine was carried to the extent that employés in different shops of the defendant were not only held to be fellow servants, but the different foremen and bosses were also held to be in the same common employment; that the act on the part of employés in running a gas pipe from one shop to another, at such distance from the track as to be dangerous to employés on its trains, whereby on the day it was so constructed or placed one of the latter was injured, was the act of fellow servants. *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. St. 400, 4 Atl. 53.

ery and appliances, though employed by the same master, engaged in the same common work, and for the same general purposes, are not fellow servants with those who have to use them. As stated in a recent case: "There are some duties which the master owes to his servant, and from which he cannot relieve himself, except by performance. Thus, the master owes every employè the duty of providing a reasonably safe place to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct, personal, and absolute obligation; and the master may delegate these duties to an agent, and such agent stands in the place of his principal, and the latter is responsible for the acts of his agent; and where the master places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate." <sup>4</sup>

We should have but little difficulty in determining the law in this state upon this branch of the subject from such positive language, were it not for the decisions of the same court in other cases, not expressly overruled.

In *Ardesco Oil Co. v. Gilson*,<sup>5</sup> they state the rule to be that the master's duty in respect to furnishing suitably safe appliances is performed "by the employment of others, not as servants, but as mechanics, or contractors in an independent business, and they are of good character, and if there was no want of due care in choosing them, he incurs no liability for injuries resulting to others from their negligence or want of skill,"—and illustrate this rule by saying: "If I employ a well-known and reputable machinist to con-

<sup>4</sup> *Lewis v. Selfert*, 116 Pa. St. 628, 11 Atl. 514.

<sup>5</sup> 63 Pa. St. 150.



struct a steam engine, and it blows up from bad materials or unskillful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and 'respondeat superior' is the rule." This language might be excused as being applicable to where there was an independent contractor, the master having used due and proper care in inspecting and testing the machine after its construction, or where machines were purchased in the first instance from reputable dealers. It might then be said that the master had exercised due care in supplying machinery for use by his servant.

Yet we are met by a later decision, in the case of *Mansfield Coal & Coke Co. v. McEnery*,<sup>6</sup> which indicates that it was intended to place the decision upon other grounds. The negligence charged in this case was the imperfect construction of a bridge. The defense was that the defendant had exercised ordinary care and skill in the selection of employes to construct it; that it was built by Henry Willard, a carpenter and experienced bridge builder, who was employed by the company to construct the bridge, and the construction of which was under his supervision and control; and that he was paid by the day. The court held that such defense was ample; that it is not enough to show that his work was unskillfully done, or that he was incompetent. "It must appear that the defendants were guilty of negligence in selecting him; that they either knew he was incompetent, or with proper diligence might and ought to have known it. It was of no consequence

<sup>6</sup> 91 Pa St. 191.

that he was employed by the day. The manner of his compensation does not affect the question under discussion."

The language of this case expresses the doctrine, and carries it to the extreme, that the master may delegate the performance of his duties to a competent and skilled agent or servant, or one that he has the right to assume to be such, and that he has met his duty when he selects such an agent or servant to perform them in his stead; which, if true, ignores the general rule so aptly stated in *Lewis v. Seifert*,—or makes an important exception thereto,—that the master is to provide a suitably safe place for his servant to work, and reasonably safe instrumentalities with which to perform his work; and though this duty, which is direct, positive, and personal, be delegated, yet the responsibility of the master for its neglect by the person to whom delegated remains.

The doctrine of this case is exceptional. Undoubtedly, the rule stated in *Lewis v. Seifert* is the law upon the subject in this state. The doctrine of superior and subordinate is not recognized. The mere fact that the servant who is injured is inferior in grade to, and subject to the control and direction of, the superior servant whose act causes him injury, does not change their relation as fellow servants, providing they are both co-operating to produce the same results. Where, however, the master has placed the entire charge of the business in the hands of an agent, exercising no authority and no superintendence of his own therein, he may be liable for the negligence of such an agent to a subordinate employé. Corporations in this respect, both as to liability and for protection, stand on the same footing as individuals.<sup>7</sup>

<sup>7</sup> *Lehigh Val. Coal Co. v. Jones*, 86 Pa. St. 439; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Patterson v. Railroad Co.*, 76 Pa. St. 394.

The language used in *Lehigh Val. Coal Co. v. Jones* would seem to dispel any doubt which the court may have expressed in *Patterson v. Railroad Co.* as to the rule being strictly applicable to cases where the master is not a corporation. It is stated in the latter case, that, in case of corporations, it is not the company, but the officer to whose care is committed the particular department of its business, who is expected to use ordinary care in the conduct thereof, and whose negligence therein is the negligence of the company.

#### THE RULE IN NEW JERSEY.

The test, say the court, which will determine what is a common employment of workmen, has been fixed in this state. The court of errors has declared a fellow servant to be one who serves and is controlled by the same master, and common employment to be service of such kind that in the exercise of ordinary sagacity all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants they may be exposed to injury.<sup>8</sup>

The court seem to realize that the test may not always be easy of application, as they say: "But there are doubtless many cases where it will be difficult to draw the line between the employé who represents his employer and the workman who stands on the footing of a common employment of his fellow workman. Employers may put in their place an agent or representative in carrying on their work, for whose default and negligence they may be liable. Employing corporations can only act by such agents. The

<sup>8</sup> *Rogers Locomotive & M. Works v. Hand*, 50 N. J. Law, 464, 14 Atl. 766; *McAndrews v. Burns*, 39 N. J. Law, 117; *Ewan v. Lippincott*, 47 N. J. Law, 192.

president of such a corporation has been held to occupy such a relation [citing *Smith v. Iron Co.*].<sup>9</sup> Upon the principles settled in that case it is probable that other officers of such corporations may occupy, under certain circumstances, similar relations."<sup>10</sup>

The fact that the injured and offending servant may be employed in different departments of the common service does not alter their relations as fellow servants, nor is any distinction made between those who are at work upon the machinery or ways and those who are to use them. The one does not represent the master, and is not engaged in performing a master's duty, more than the other.<sup>11</sup>

It was accordingly held, if a railroad company employed agents of competent skill to regularly examine the bridges of the road, and such agents represented them to be secure, and there was no reason to doubt the accuracy of their report, then, although the agents acted carelessly in the discharge of their duties, the company would not be liable to a brakeman in their employ for an injury received by a defective bridge. The workmen employed to note the need of repairs upon bridges were held to be in a common employment with the workmen whose trains run thereon. One employed to repair the bridge would come under the same rule.<sup>12</sup>

The court of errors, in dealing with the case of an employer who had furnished appliances conducive to the safety of his workmen while being raised to the surface from a tunnel they were excavating, and had directed the

<sup>9</sup> 42 N. J. Law, 467.

<sup>10</sup> *Rogers Locomotive & M. Works v. Hand*, 50 N. J. Law, 464, 14 Atl. 766.

<sup>11</sup> *Rogers Locomotive & M. Works v. Hand*, 50 N. J. Law, 464, 14 Atl. 766; *Harris v. Railway Co.*, 31 N. J. Law, 293.

<sup>12</sup> *Harris v. Railway Co.*, 31 N. J. Law, 293.

workmen in charge of the raising to make use of such appliances, say: "The laborer whose duty it was to deliver on the surface of the shaft, or there use and keep in repair the instrumentalities provided by the defendant for the safe conduct of, the laborers to and from the tunnel, was, in the view of the law, a fellow servant of deceased, whose place of labor was in the tunnel, and they were engaged in a common employment."<sup>13</sup>

The mere fact that one is of higher grade or has superintending authority over the other does not alter their relations as fellow servants. When the principal surrenders the entire control and management of his business, or a branch thereof, to a superintendent, who stands in his place, such person so employed may so far represent the master as to become a vice principal. The mere fact that one should be selected by the master as foreman, leader, or boss does not change his relation to the others. This sort of superiority is so essential and so universal that every workman entering upon a contract of service must contemplate it being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from another fellow workman. The foreman or superior servant stands to him, in that respect, in the precise position of the other fellow servants.<sup>14</sup> The superior servant in the case referred to was captain and had charge of one of the defendant's dredges.

#### THE RULE IN MARYLAND.

In this state it was said by the supreme court: "It is now settled that there is no contract obligation imposed

<sup>13</sup> *McAndrews v. Burns*, 39 N. J. Law, 117.

<sup>14</sup> *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 824.

upon the master, from the mere relation that he bears to his servant, to provide machinery of any particular character or description to be operated by the latter; nor is there any implied undertaking on the part of the former, resulting from the mere relation of employer, that the machinery shall be kept free from defects, such as may expose the servant to danger. The servant is a free agent to select the employment into which he enters, and, in contracting for the wages that he is to receive, must be supposed to take into account the risks to which the employment may expose him, and among those risks are the defects and accidents of the machinery, and the negligence and want of caution of fellow servants in the common employment. To hold the master liable to the servant for all the injuries resulting to the latter from defects in the machinery or materials upon which he may be employed, or from the negligence of fellow servants engaged in the common employment, would go far to impede, if not to make it impossible to carry on, many of the great works of the country. All that can be required of the master, and for the neglect of which he is responsible to the servant, is that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment. He is required also, as far as he can by reasonable care, to avoid exposing his servant to extraordinary risks which could not have been reasonably anticipated at the time of the contract of service, though as to such extraordinary risks the master does not guaranty against them. From these general principles it follows that the master is not liable to his servant for any injury occasioned by a defect of machinery furnished to the latter to operate, unless he was negligent in providing such

machinery, or, if he knew of the defect, in omitting to warn the servant of its existence; and where the defect producing the injury complained of was the consequence of the incompetency or neglect of a fellow servant, or when the origin of the defect did not appear, it has been held that the master was not liable to his servant, it not appearing that he had been guilty or negligent, either in selecting the fellow servant or in providing the machinery in which the defect occurred.”<sup>15</sup>

As to who are fellow servants, the court say: “The decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different departments of it, are fellow servants, each taking the risks of the other’s negligence; or, to state the rule more generally, all who are engaged in accomplishing the ultimate purpose in view—that is, the running of the road—must be regarded as engaged in the same general business, within the meaning of the rule. It follows, therefore, that the brakeman on the train is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, and with the inspector of the machinery and rolling stock of the road and the superintendent of the movement of trains.”<sup>16</sup>

The court in another case define clearly the relation of those servants or agents who are intrusted with the purchase and supplying of machinery in the first instance, and hold that such agents directly and personally represent the master. “It was the duty,” say the court, “of the de-

<sup>15</sup> *Wonder v. Baltimore & O. R. Co.*, 32 Md. 416.

<sup>16</sup> *Wonder v. Baltimore & O. R. Co.*, 32 Md. 418; *Hanrathy v. Railway Co.*, 46 Md. 280; *Yates v. McCullough Iron Co.*, 69 Md. 370, 10 Atl. 280.

fendant, to supply, as far as it could be done by the exercise of due and proper care, safe and sound machinery. The persons specially authorized to make the selection and purchase of the engine must be taken as the representatives of the defendant, and any omission or neglect committed by them must be regarded as that of the defendant, and for which it is liable. Those agents, therefore, are not to be regarded as fellow servants of those operating it; for in respect to the selection and purchase of the engine they acted as agents representing the principal in regard to matters for which the latter might be liable to its servants."<sup>17</sup>

In commenting upon this case, the same court, in *Yates v. McCullough Iron Co.*,<sup>18</sup> say that it did not follow, from what they had thus said, that Jordon (who was one of the purchasing agents) was not, in his ordinary employment as master of machinery, a fellow servant of the fireman who was injured.

The doctrine of superior and subordinate, it may be said, is not recognized in this state; at least, it is ignored to as great an extent, perhaps, as in any other state in the Union. The only exception to the general rule, or, more directly speaking, the only instance where one who is superior in grade or rank, having control over other servants, can be said to represent directly the master, and not to be classed as a fellow servant, is where the middleman or superintendent is intrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant. If the master relinquishes all supervision of the work, and intrusts not only the supervision and direction of the work, but the selection and employment of laborers, and the procuring of materials,

<sup>17</sup> Case of *Moran*, 44 Md. 295.

<sup>18</sup> 69 Md. 370, 16 Atl. 280.



machinery, and other instrumentalities necessary for the service, to the judgment and discretion of a manager or superintendent, in such case the latter becomes a vice principal, and for his omissions or negligence in the discharge of those duties the principal will be liable.<sup>19</sup>

Thus it was held that the captain of a steam tug owned by the company was a fellow servant of a common laborer,<sup>20</sup> and also that a superintendent or manager was a fellow servant with employés under his control.<sup>21</sup>

### THE RULE IN IOWA.

As applied to the operation of railways, the question is regulated by statute,<sup>22</sup> which provides: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employés, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal and binding."

In the construction of this provision, the courts have experienced considerable difficulty, and, in their efforts to apply it to different facts, I think it will be conceded that their decisions are not precisely consistent.

It is held that this provision affords a remedy only to

<sup>19</sup> State v. Malster, 57 Md. 287, 308.

<sup>20</sup> Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338.

<sup>21</sup> State v. Malster, 57 Md. 287.

<sup>22</sup> Code, § 1307.

such employes as are employed, at the time of receiving the injury, in the business of operating a railroad.<sup>23</sup> Yet to properly define and declare what employments connected with a railroad, in contemplation of the law, are embraced within the operation thereof, is a task not easily performed.

In *Stroble v. Chicago, M. & St. P. Ry. Co.*<sup>24</sup> it was held that, in order to render a company liable for injuries to an employe by reason of the negligence of a co-employe, the negligence complained of must be that of an employe, and affect a co-employe, who are in some manner performing work for the purpose of moving a train; as, loading or unloading it, or superintending, directing, or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from the train, is not connected with its movement. The court say: "What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? It can be operated in no other way than by the movement of trains."<sup>25</sup>

In the earlier cases the test was whether the employe was engaged for the discharge of a duty which exposed him to the perils and hazards of the business of railroads, and it did not affect the question that the employe's injuries did not arise from such hazards, so long as his employment embraced them.<sup>26</sup>

<sup>23</sup> *Malone v. Burlington, C. R. & N. Ry. Co.*, 65 Iowa, 417, 21 N. W. 756.

<sup>24</sup> 70 Iowa, 555, 31 N. W. 63.

<sup>25</sup> *Foley v. Chicago, R. I. & P. Ry. Co.*, 64 Iowa, 644, 21 N. W. 124; *Malone v. Burlington, C. R. & N. Ry. Co.*, 65 Iowa, 417, 21 N. W. 756.

<sup>26</sup> *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 56; *Frandsen v. Same*, Id. 376.

In *Smith v. Railroad Co.*<sup>27</sup> the grounds upon which those cases were decided is ignored; and the court say, in referring to *Deppe v. Chicago, R. I. & P. Ry. Co.*, that the duty of the employés required them to ride upon the cars. Deppe was a laborer working on a dirt or construction train. Frandsen was a section hand. Smith also was a section hand. Frandsen was injured by a wheel of a hand car. He had been riding upon the hand car, but left it in the face of an approaching train, and the wheel of the hand car was thrown against him, by the force of the collision of the hand car with such train. Smith, on the other hand, was injured while engaged in loading a car. In the latter case it was held that the service did not pertain to the operation of a railway (citing *Schroeder v. Railroad Co.*),<sup>28</sup> while in the former case it was held that Deppe and Frandsen were so engaged.

The earlier cases were decided under the statute of 1862, which was as follows: "Every railroad company shall be liable for damages sustained by any person, including employés of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employés of the corporation, to any person sustaining such damages." The question of whether the injured servants were engaged in the operation of trains was discussed.

In the following cases the plaintiffs were held to be within the terms of the act: A person engaged in working on a bridge of the company, and required, in the course of his employment, to ride on its trains.<sup>29</sup> A hand engaged in shoveling gravel from a gravel train.<sup>30</sup> A section hand injured by a portion of the hand car being thrown against

<sup>27</sup> 59 Iowa, 75, 12 N. W. 763.

<sup>28</sup> 41 Iowa, 344.

<sup>29</sup> *Schroeder v. Railroad Co.*, 47 Iowa, 375.

<sup>30</sup> *McKnight v. Railway Co.*, 43 Iowa, 406.

him by its contact with a train.<sup>31</sup> A hand engaged in the operation of a dirt train.<sup>32</sup> A private detective of the company, injured while on the track. His engagement was such as to subject him to the hazards of the business.<sup>33</sup>

In the following cases the plaintiffs were held not to be within the provisions of the act: An employé whose duty it was to wipe off engines, open and close doors of the engine house, and remove snow from the turntable and tracks, and operate the turntable, injured by the negligence of a co-employé causing the door of the engine house to fall upon him;<sup>34</sup> an employé engaged in tearing down an old bridge, and riding upon the train for the purpose of unloading timbers thereof;<sup>35</sup> employés in a machine shop;<sup>36</sup> an employé whose duty it was to repair cars standing upon the track;<sup>37</sup> employés engaged in repairing the track; one injured by the negligence of another;<sup>38</sup> employés engaged in hoisting coal into a coal house for the purpose of filling a car;<sup>39</sup> employés engaged in elevating coal to a platform for the use of engines;<sup>40</sup> a section hand engaged in loading a car.<sup>41</sup>

As to those cases not embraced within the provisions of the statute, the common-law rule exempting the employer

<sup>31</sup> *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 372.

<sup>32</sup> *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52.

<sup>33</sup> *Pyne v. Railroad Co.*, 54 Iowa, 223, 6 N. W. 281.

<sup>34</sup> *Malone v. Burlington, C. R. & N. Ry. Co.*, 65 Iowa, 417, 21 N. W. 756.

<sup>35</sup> *Schroeder v. Railroad Co.*, 41 Iowa, 347.

<sup>36</sup> *Potter v. Railroad Co.*, 46 Iowa, 399.

<sup>37</sup> *Foley v. Chicago, R. I. & P. Ry. Co.*, 64 Iowa, 644, 21 N. W. 124.

<sup>38</sup> *Matson v. Railway Co.*, 68 Iowa, 22, 25 N. W. 911.

<sup>39</sup> *Luce v. Railway Co.*, 67 Iowa, 75, 24 N. W. 600.

<sup>40</sup> *Stroble v. Railway Co.*, 70 Iowa, 555, 31 N. W. 63.

<sup>41</sup> *Smith v. Railway Co.*, 59 Iowa, 73, 12 N. W. 763.

from liability for injury to an employé is still in force.<sup>42</sup> That rule, as held in this state, repudiates the Ohio doctrine of superior and subordinate. Where the superior is invested with no authority in the general management of the business, though he may be a foreman having charge and control of the inferior servant, he is not a vice principal, but his relation to the servant under his control is that of a fellow servant.<sup>43</sup> But where such superior is invested with the charge of a particular piece of work, though not of a department, with full power to employ and discharge men working therein, then he is to be regarded as a vice principal. A person exercising the duties delegated to him by the master in his absence is a temporary vice principal, and notice of defects to either is notice to the master.<sup>44</sup>

The rule in this state is that those who are engaged in supplying and maintaining in repair the premises, ways, appliances, and machinery are engaged in a distinct employment from those whose duties are in the use of them, and they are not fellow servants.<sup>45</sup>

<sup>42</sup> *Potter v. Railroad Co.*, 46 Iowa, 399.

<sup>43</sup> *Peterson v. Whitebreast Coal & Min. Co.*, 50 Iowa, 674.

<sup>44</sup> *Baldwin v. St. Louis, K. & N. W. Ry. Co.*, 75 Iowa, 297, 39 N. W. 507.

<sup>45</sup> *Brann v. Railroad Co.*, 53 Iowa, 597, 6 N. W. 5; *Theleman v. Moeller*, 73 Iowa, 108, 34 N. W. 765.

## CHAPTER XVI.

### FELLOW SERVANTS (Continued).

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**THE RULE IN KANSAS.**

This state, as early as 1874, adopted a co-employé act, providing that "every railroad company shall be liable for damages sustained by any person, including employés of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employés of the corporation, to any person sustaining such damage." The statute in force<sup>1</sup> is substantially the same. It is as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by mismanagement of its engineers or other employés, to any person sustaining such damage." This statute was borrowed from the statute of Iowa, which was enacted in that state in 1862, and was in force there until 1872, when their present statute was enacted (slightly amended in 1873).

Under the statute in question, the employés who are within its provisions are not confined to those who are injured while actually engaged in the operation of a railroad, as is the rule in Iowa and Minnesota.

In the recent case of *Atchison, T. & S. F. R. Co. v. McKee*<sup>2</sup> the question was urged that the law of 1874 was not applicable to employés who were working in car shops, but only to the hazardous business of railroading; that there ought to be no distinction between the liability of railroads in manufacturing cars and companies and other corporations engaged in such business. The supreme court declined to discuss that question, but decided the case upon the ground of the master's duty to provide reasonably safe appliances. The common-law rule, as construed in

<sup>1</sup> 1 Gen. St. 1889, par. 1251.

<sup>2</sup> 37 Kan. 592, 15 Pac. 489.



this state, has some of the features of the New York rule. The supreme court state "that there are two classes of cases in which the employés of the same master are not such co-employés that one of them may not recover for injuries caused by the negligence of another while all are engaged in transacting some portion or portions of the common master's business. The first class is where the negligent employé is one who has the general management of or control over some portion or line of the master's business, and has control over the injured employé and the other employés engaged in that portion or line of business. The other class of cases is where two or more sets of employés are engaged in different lines of employment; as, for instance, where one set of employés has charge of a railroad train and its operation, while the other set is to keep the road in proper condition and repair. The duties devolving upon the master towards his servant are stated to be the use of reasonable care to provide the servant with a reasonably safe place to work, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him. Whenever the master delegates to any officer, servant, or agent, high or low, the performance of any of the duties above mentioned which really devolves upon the master, then such person stands in the place of the master, and becomes a substitute for the master,—a vice principal,—and the master is liable for his acts or his negligence to the same extent as though the master had himself performed the acts or was guilty of the negligence." It is further stated by the court: "Where employés work in different lines of employment, one having no means of knowing anything about the business or qualifications of the others, and being wholly unacquainted with the other, they cannot be said to be fellow servants. within the meaning of the rule." To a certain extent, at least,

this is the Illinois rule, or at least the reasoning upon which that rule is founded.

The rule of superior and subordinate is not recognized in full. Its application is confined to one who is subordinate to and under control of an agent, who has the management of or control over some distinct line or portion of the master's business, and is not extended to the cases of conductors, section bosses, or foremen who have merely the charge of operating some particular part thereof. The rule in this state, as in some others, is very flexible. Just where the line will be drawn is uncertain, and cannot be stated in advance.

The Ross Case<sup>3</sup> was declared extreme, and against the weight of authority, and the same as to Louisville & N. R. Co. v. Bowler,<sup>4</sup> in which case it was held that the section boss, as to his subordinates, was a vice principal. Yet in Hannibal & St. J. Ry. Co. v. Fox<sup>5</sup> language is used which is strongly expressive of the conclusions arrived at by the courts of Missouri as to the master's duty, and the position of a foreman in charge of work and men. The Missouri courts cite the case as sustaining their views. The duty on the part of the master to exercise supervision over the work and the men engaged in performing it, and not to expose the servant to perils outside of his employment, or perils not ordinarily incident thereto, are prominent features in the case; but they are considered and discussed in connection with the principle that it is the master's duty to provide a reasonably safe place for his servant to perform his work in; and as to what effect or influence one of the rules sought to be applied may have had upon the

<sup>3</sup> 112 U. S. 377, 5 Sup. Ct. 184.

<sup>4</sup> 9 Heisk. 866.

<sup>5</sup> 31 Kan. 586, 3 Pac. 320.

other, and what effect all combined would have in producing the result, is not very clear or certain.<sup>6</sup>

### THE RULE IN ILLINOIS.

The negligence of fellow servants is one of the ordinary perils of the service which one takes the hazards of in entering into any employment; but the master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes. Care in supplying safe instrumentalities in the doing of the work undertaken by the servant is a duty the master owes to the servant, and, when the performance of that duty is devolved upon a fellow servant, the master's responsibility in respect to that duty still remains. In such case the negligence of the fellow servant is the master's neglect of duty.<sup>7</sup> This

<sup>6</sup> *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 415; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 489; *Missouri Pac. Ry. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 361; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 633.

<sup>7</sup> *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 315.

An engineer employed by a mining company to operate an engine used in letting down a cage to the bottom of the shaft and a track layer in the mine are fellow servants. *Niantic Coal & Min. Co. v. Leonard*, 126 Ill. 216, 19 N. E. 294.

A laborer upon a construction train is a fellow servant with the engineer and conductor. *Miller v. Railway Co.*, 24 Ill. App. 326.

A blacksmith in the service of a railroad company and a conductor of a train are fellow servants while temporarily traveling together on their way to remove a wreck. *Abend v. Railroad Co.*, 111 Ill. 202.

Where two sets of men employed by a railroad company, while working at their respective duties, are necessarily more or less in the way of and crossing the lines of each other, whether or not they are fellow servants is a question for the jury. *Chicago, etc., Ry. Co. v. Kelly*, 127 Ill. 637, 21 N. E. 203.

The pit boss of a mine, who has authority to tell the men to do

doctrine extends to and includes servants whose duty it is to put up and keep machinery in repair, and such are not fellow servants with those engaged or employed to use it.<sup>8</sup>

The rule as to superior and subordinate is thus stated by the supreme court: "A servant having the exclusive control over other servants under a common master, including the hiring and discharging, is, in the exercise of those powers, the representative of the master, and not a mere fellow servant. The mere fact, however, that one

certain work or quit, is a vice principal. *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627.

A foreman, while performing the duty of a servant, is a fellow servant with the employes under him. *Fitzgerald v. Honkomp*, 44 Ill. App. 365.

A railroad laborer employed to unload rails is not a fellow servant of the engineer of a locomotive, when the defect or cause of the injury was the engineer's failure to report to the master mechanic the defective condition of the engine. *Peoria, etc., Ry. Co. v. Johns*, 43 Ill. App. 83.

The fact that a section foreman who is injured by a train running upon time, contrary to signal, was the one who ordered the signal to be given, does not tend to show he was co-operating with those in charge of the train so as to render them fellow servants. *Peoria, etc., Ry. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951.

It is for the court to define the relation of fellow servants, and for the jury to determine whether two servants come within the definition. *Chicago, etc., Ry. Co. v. Tuite*, 44 Ill. App. 535.

Where a superior servant gives an order which he knows it will be very dangerous to obey, and the servant obeys without knowl-

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<sup>8</sup>*Tudor Iron Works v. Weber*, 31 Ill. App. 306; *Holton v. Daly*, 4 Ill. App. 25.

A servant employed to keep and put machinery in proper order is not the fellow servant of one whose duty it is to use it. *Tudor Iron Works v. Weber*, 31 Ill. App. 306; *Id.*, 129 Ill. 535, 21 N. E. 1078.

Car inspectors and engineers are not fellow servants. *Chicago & A. Ry. Co. v. Hoyt*, 122 Ill. 369, 12 N. E. 225.

of a number of servants who are in the habit of working together in the same line of employment for a common master has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to the circumstances. On the other hand, the mere

edge of the danger, the master is liable. *Stearns v. Reidy*, 33 Ill. App. 246; *Id.*, 135 Ill. 119, 25 N. E. 762.

Where the foreman of a section gang failed to warn the men of approaching trains, he was not, as to such duty, their fellow servant. *Chicago, etc., Ry. Co. v. Gross*, 33 Ill. App. 178; *Id.*, 133 Ill. 37, 24 N. E. 563.

A foreman in a clay mine, who hired and discharged laborers at will, keeping their time, and paying them, and giving them all directions about work, is not a fellow servant with laborers under him. *Chicago, etc., Brick Co. v. Sobkowiak*, 34 Ill. App. 312.

Locomotive engineers on the same road are fellow servants with each other. *Ohio, etc., Ry. Co. v. Robb*, 36 Ill. App. 627.

Engineer and section foreman are not fellow servants, where latter is injured by a piece of coal thrown or falling from a passing engine. *Chicago & N. W. Ry. Co. v. Moranda*, 108 Ill. 576.

If the act by a foreman causing injury relates to his duty as a co-laborer, the master is not responsible; but if it results from authority conferred upon him over co-laborers, the master will be liable. *Chicago & A. R. Co. v. May*, *Id.* 288.

Brakeman and conductor are fellow servants, where latter is injured. *Chicago & N. W. Ry. Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604.

One whose usual employment is to load and unload cars in the yard of a rolling mill is not the fellow servant of persons whose usual duty it is to have control of trains moving in the yard, even though he and said persons, while engaged in their respective employments, can each observe how the other does his work. *North Chicago Rolling-Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186.

A contractor engaged in changing the gauge of a railroad is a servant of the company, and the company is chargeable with his negligence in causing an injury to one of his employés. *Toledo, etc., R. Co. v. Conroy*, 39 Ill. App. 351.

fact that the servant exercising such authority sometimes or generally labors with the others as a common hand will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over others. Every case in this respect must stand upon its own circumstances. If the negligence complained of consists of some act done or omitted, by one having such authority, which relates to his duty as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, then the common master will not be liable; but when the negligent act complained of arises out of, and is the direct result of, the exercise of the authority conferred upon him by the master over his co-laborer, the master will be liable. To illustrate the rule, when a railway company confers upon one of its employes authority to take charge of and control a gang of men in carrying on some particular branch of its business, he is the direct representative of the company, and all commands given by him within the scope of his authority are, in law, the commands of the company. The fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising the power, he does not stand on the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations; and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." \*

Where, however, the person in control, even though he

\* Chicago & A. R. Co. v. May, 108 Ill. 300.

has the authority to hire and discharge the men, is doing the work of a common servant, independent of his authority, he is a fellow servant.<sup>10</sup>

A doctrine of co-association peculiar to this state is applied in determining the relation of fellow servants. It is stated by the court as follows: Servants of the same master, to be co-employés so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business,—that is, the same line of employment,—or their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of caution. What is meant is, if the parties continue to be engaged in a common service, they will be habitually associated, so that they may exercise influence over each other promotive of common safety.<sup>11</sup>

The idea is that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against their consequences. Where there is no right or opportunity of supervision, or where there is no independent will, or no right or opportunity to take measures to avoid the negligent act of another without disobedience to the orders of his immediate superior, the doctrine can have no application. Say the court: "How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable in a reasonable way, while engaged in the proper discharge of his duties, and without

<sup>10</sup> *Fanter v. Clark*, 15 Ill. App. 470; *Fitzgerald v. Honkomp*, 44 Ill. App. 365.

<sup>11</sup> *North Chicago Rolling-Mill Co. v. Johnson*, 114 Ill. 64, 29 N. E. 186; *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369, 12 N. E. 225.

disobedience to his immediate superior, to influence the conduct of laborers in that department?"<sup>12</sup>

The rule, if it may be called such, last stated, is so indefinite that it occasions no surprise that the courts are led into great difficulty in their attempt to apply it. They are forced to the extremity of declaring that the circumstances of each case are to be considered as controlling; and, finally, it is held that it is for the court to define the relation of fellow servants, and for the jury to determine whether two servants come within the definition.<sup>13</sup>

#### THE RULE IN WEST VIRGINIA.

The doctrine of superior and subordinate prevails in this state. The exact rule is best stated in the language of the supreme court: "Two servants of the same master are not fellow servants when one acts in a superior capacity to the other in regard to some duty due from the master; and the master is liable for any injuries to the subordinate caused by the carelessness or negligence of the superior. At one time it was held that, to make the master responsible, he must have intrusted the superior servant with the actual control of all his business,—made him his alter ego. It was subsequently held that this superior servant must have power to employ and discharge the inferior servant. But now it seems to be considered sufficient that the inferior servant is under the control of the superior servant."<sup>14</sup>

This language was quoted with approval in a very recent case. Language was also used which would seem to indicate that the Illinois rule was in favor, to a certain extent.

<sup>12</sup> North Chicago Rolling-Mill Co. v. Johnson, 114 Ill. 64, 29 N. E. 186.

<sup>13</sup> Chicago & N. W. Ry. Co. v. Tuite, 44 Ill. App. 535.

<sup>14</sup> Madden's Adm'r v. Railroad Co., 28 W. Va. 618.



The injured servant was an employé whose duty it was to take and record the numbers and characters on cars coming into a station. His work was in the engine yard. The offending servant was an engineer running an engine for switching in the same yard. The court say: "Plainly, this engineer and car numberer were fellow servants. There was a natural and necessary connection between the classes of service they rendered, bringing them into contact with each other in the same place in the execution of the master's business, which was the pursuit common to both, and they were under common pay and control of that master, and it is no matter that their work was dissimilar. Neither was the agent of the master as to the other."<sup>15</sup>

It was held that, where a brakeman on one train was injured by the negligence of a conductor of another train, the master was liable for such injuries. They were not fellow servants.<sup>16</sup> The opinion in this case is elaborate. The reasoning is not entirely satisfactory. I am unable to discover under what rule the conclusion was reached. It certainly was not based upon the doctrine of superior and subordinate, as one was not in control over the other. Nor could it be based upon the master's duty as to appliances. It must have been based upon the assumption that the conductor represented the master,—was a vice principal,—not only as to those who were operating the train under him, but also as to all others who might be employed in the use of the track.

The duty of the master is supervision. Inspectors, and those employed to direct, represent the master; their fault is imputable to him.<sup>17</sup>

<sup>15</sup> *Beuhring's Adm'r v. Chesapeake & O. Ry. Co.*, 37 W. Va. 502, 16 S. E. 435.

<sup>16</sup> *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397, 15 S. E. 162.

<sup>17</sup> *Johnson v. Chesapeake & O. Ry. Co.*, 36 W. Va. 73, 14 S. E. 432.

The distinction existing and so prominent in many states between those who provide or repair the ways and appliances and those who use them does not seem to be recognized in this state.

#### THE RULE IN ARKANSAS.

It is undoubtedly the rule in this state that it is a duty incumbent upon the master, and which he cannot delegate to another, so as to relieve himself from responsibility to a servant who is injured by its negligent performance by such other, to furnish and supply for the use of his servant reasonably suitable and safe ways and appliances; but that as to repairs, or maintaining the same in such reasonably safe condition, the master may delegate the performance of some of these duties, or to a limited extent, to others, and thus be relieved from personal liability for neglect in their performance. To what extent and under what conditions he may do this is best expressed by the supreme court of this state in *St. Louis, I. M. & S. Ry. Co. v. Rice*.<sup>18</sup>

The question under consideration was whether a yard inspector, whose duty it was to examine all cars as they arrived, repair all slight defects he found in them, and, in case of more serious defects, mark them "B. O.," and have them sent to the repair shops, and a yard foreman, whose duties were to make up trains in the yard, couple cars, and move cars marked "B. O." to the repair shops, were fellow servants.

The trial court had charged the jury that the duty which defendant owed to its employes to exercise ordinary care and prudence in furnishing them safe appliances with which to perform the service intrusted to them, and to keep said appliances in good repair, could not be delegated to an

<sup>18</sup> 51 Ark. 467, 11 S. W. 609.

agent or servant of defendant, so as to relieve defendant from responsibility. "The defendant may not be able to perform this duty in person, but he must see that some one discharges it faithfully for him. He cannot shirk the responsibility. The law casts upon him certain duties to perform; and if he deposes them to another, the latter, as to these duties, is not a fellow servant with the other employes, but stands in the master's place, and his negligence is the negligence of the master. It is not material what the rank of the servant or agent is; if he is deputed to perform a duty which the employer owes to his employe, the employer is deemed to be present, and is responsible for the manner in which it is performed."

The supreme court, after stating that one line of authorities held the rule as stated by the trial court, said that "the duty of the master furnish safe appliances is performed by having repair shops to maintain its tools, rolling stock, etc., in repair, by having its inspectors determine when a general overhauling may be had, and, at convenient stations along the line, detect such injuries as may have been received en route, and the employment and retention of persons competent for the performance of such service. While we recognize the liability of the railway company for the willful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice principal."

From this language, which is not as definite as we would wish, we may deduce that those who are engaged in making repairs are engaged in the same common employment with those who are engaged in operating or using the machinery, and included are those whose duty it is, along the line, to inspect and ascertain the condition of such machinery

or of appliances; that those whose general duty is to ultimately supervise and determine upon the sufficiency of the appliances, and who have entire control of that work as a separate branch or department, and those who directly represent such an agent or superintendent, actually performing his duties, are, in the performance of such duties, the direct personal representatives of the master, for whose neglect in their performance the master is chargeable, and therefore they are not fellow servants with the employés.

The court held, in the case cited, that the yard foreman and yardmaster were not only employed and paid by the same corporation, but their separate services had an immediate and common object,—the moving of trains. Neither works under the other, and each takes the risk of the other's negligence,—citing *St. Louis, I. M. & S. Ry. Co. v. Gaines*.<sup>19</sup>

The doctrine of superior and subordinate is recognized and enforced to a liberal extent, not as fully as in Ohio, or as restrictedly as in most of the states. The extent of the authority and control over other employés is an important factor. It is not every foreman having charge of, or control over, others, who thus becomes a vice principal; nor is it essential that the superintending servant should be in charge of a department or branch of the business, or clothed with the authority and discretion of hiring and discharging the subordinate servants.

The supreme court, in a recent case, express their conclusions upon this branch of the subject from a review of cases, as follows: "And it seems that the courts have been inclined to determine whether the relation exists or does not exist according to the circumstances of each case as it arises, rather than to formulate any rule of general applica-

<sup>19</sup> 46 Ark. 555.

tion.”<sup>20</sup> The learned court was evidently correct as to the result arrived at in many cases, yet wrong as to the attempt, on the part of such courts, to apply general rules.

The Arkansas court also conclude that the relation indicated in some of the adjudged cases is apparently made to depend more upon the extent and magnitude than upon the nature of the work of which the offending servant has charge; while other courts, proceeding upon what they think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skillful or careful supervision, and, where such supervision was necessary to the safety of the laborers engaged upon the work, they have held it was the master's duty to bestow it, and that, if he appointed an agent to perform that duty, he was responsible for his negligence. They evidently approve of the Connecticut rule in this respect, and claim that the Ross Case and the more recent case of *Baltimore & O. R. Co. v. Baugh*<sup>21</sup> were decided upon such a principle, or, at least, such a rule was approved.

In referring to another case, the court further say: “Now, it was not the rank or title of the manager which made the company present in his person, but the authority with which he was clothed, and the duty of supervision he undertook to perform; and if any officer or agent of inferior grade had been, for the time, invested with the same power, and had undertaken to perform the same duty, the company would, we think, have been equally liable for his negligence.” In the case in which this discussion was had, and to which it had reference, it was decided that the foreman of a crew engaged in driving piles for

<sup>20</sup> *Bloyd v. St. Louis & S. F. Ry. Co.*, 58 Ark. 66, 22 S. W. 1089.

<sup>21</sup> 149 U. S. 368, 13 Sup. Ct. 914.

trestles for a railroad company, whose business extends to many trestles and bridges, and who has charge of all the men in the crew, including the trainmen, while actually co-operating with the other men in building and repairing trestles, is a vice principal, for whose negligence while in charge of such crew the company is liable to a member thereof who is injured thereby. The only principle which seems to have been invoked is that it is the duty of the master to bring to the accomplishment of any work required of his servant superintending skill and judgment; and for the lack of it, or for negligence of the one intrusted with this duty, the master is responsible. The rule is flexible, as we said about a similar rule in another state; and the facts and circumstances in each particular case, in connection with the disposition of the court, can only determine as to its application.

#### THE RULE IN MISSOURI.

The Missouri doctrine as to who are vice principals proceeds upon the assumption, as broad as that held by the courts of Connecticut and Arkansas, that the master's duty is that of superintendence and supervision; that he may, and must in many cases, delegate its performance to others selected by him, but, in so doing, his responsibility remains for the manner in which his duty is performed by his substitute; that the master's duty, also, is not to expose his servant to risks unknown to the servant, not ordinarily incident to the employment; and that the acts of a person exercising superintendence and control in his stead, and for him, so far as the master's liability for their negligent performance, causing injury to a subordinate employé, is concerned, are, in law, the personal acts of the master,—and from these premises they conclude that, where the master gives to a person power to superintend, control, and direct

the men engaged in the performance of work, such person is, as to the men under him, a vice principal; and it can make no difference whether he is called a "superintendent," "conductor," "boss" or "foreman," nor whether he had authority to hire and discharge the men under him.

This doctrine is of almost universal application in this state. It applies to a conductor in charge of a train; a foreman in charge of a roundhouse; a section foreman in charge of repairs upon a section of track; and, in fact, to foremen in general who have supervision of work and control over men, with authority to direct the manner in which it shall be done.<sup>22</sup>

<sup>22</sup> *Dayharsh v. Railroad Co.*, 103 Mo. 570, 15 S. W. 554; *Miller v. Railway Co.*, 109 Mo. 350, 19 S. W. 58; *Tabler v. Railroad Co.*, 93 Mo. 79, 5 S. W. 810; *Brothers v. Cartter*, 52 Mo. 372; *Gormley v. Iron Works*, 61 Mo. 492; *Whalen v. Centenary Church*, 62 Mo. 326; *Cook v. Railroad Co.*, 63 Mo. 397; *Moore v. Railroad Co.*, 85 Mo. 588; *Stephens v. Railroad Co.*, 86 Mo. 221; *Hoke v. Railroad Co.*, 88 Mo. 360; *Smith v. Railroad Co.*, 92 Mo. 366, 4 S. W. 129.

Employés working together under one common directing superior are fellow servants. *Foster v. Railway Co.*, 115 Mo. 165, 21 S. W. 916.

Such superintending employé is not a fellow servant with those under his charge, though he has no power to hire or discharge them. *Id.*

A foreman in charge of a gang of men, who has power to command when, where, and how the men shall work, is a vice principal, though he has no power to hire and discharge men. *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356; *Cox v. Syenite Granite Co.*, 39 Mo. App. 424.

A railroad track repairer and a locomotive engineer are not fellow servants. *Schlereth v. Railway Co.*, 115 Mo. 87, 21 S. W. 1110.

The foreman or boss of a hand crew, who furnishes one of the hands with a defective lever wherewith to propel such car, and places him in a dangerous place to operate it, is a vice principal. *Banks v. Railway Co.*, 40 Mo. App. 458.

A foreman in charge of a roundhouse, having control and direction

The courts of this state evidently hold the principle that the character of the service performed or act done determines the relation of the offending servant; that, in the performance of those duties which are personal to the master, he acts as master; and that as to the duties which he performs as a servant, and which are such as pertain to the duties of a servant, he is acting as a servant, and as to

of the men employed therein, who personally orders one of them into a pit under the track, and negligently, in person, moves an engine upon him, is not his fellow servant. *Dayharsh v. Railway Co.*, 103 Mo. 570, 15 S. W. 554.

Two foremen of section gangs are fellow servants, though, as to men under either, the negligent foreman is a vice principal. *Sherin v. Railway Co.*, 103 Mo. 378, 15 S. W. 442.

A yardmaster having power to hire and discharge employes, and having general charge of the company's business at a particular place, is not the fellow servant of a switchman, also employed there. *Taylor v. Railway Co.* (Mo. Sup.) 16 S. W. 206.

The foreman of a gang engaged in unloading a large stone from a flat car, who is not working with the gang, but merely giving directions and orders, is not a fellow servant with such men. *Higgins v. Railway Co.*, 43 Mo. App. 547.

Agent with control over work, and with power to employ and discharge men and direct their employment, is a vice principal. *Stephens v. Railway Co.*, 86 Mo. 221.

Brakeman and car inspector are not fellow servants, when former is injured. *Condon v. Missouri Pac. Ry. Co.*, 78 Mo. 567.

Bridge carpenter and wrecking master are not fellow servants. *Tabler v. Railway Co.*, 93 Mo. 79, 5 S. W. 810.

Car repairer and foreman are not fellow servants, when latter fails to put out signal flags. *Moore v. Railway Co.*, 85 Mo. 588.

Those who furnish and keep machinery in repair represent the master, and are not fellow servants with those who use it. *Covey v. Railway Co.*, 86 Mo. 635.

Section master not a fellow servant with switchmen. They are working in distinct departments of the common employment. *Hall v. Railway Co.*, 74 Mo. 298.

A laborer working in a railroad company's quarry near the com-



the others he is a fellow servant. That he may occupy such a dual position was held in the case of *Miller v. Railway Co.*<sup>23</sup>

The courts of this state, in late cases, seem to be influenced, to some extent, by the legislation of other states, in restricting the application of the rule as to fellow servants; and the inconsistency of recent decisions with former ones, if any, will be accounted for by this circumstance.<sup>24</sup>

The department rule is recognized. The court say:

pany's main track, under direction of a foreman, having no connection with the train service, is not a fellow servant of train operatives. *Dixon v. Railway Co.*, 109 Mo. 413, 19 S. W. 412.

A foreman in charge of laborers in moving the roof of a railroad company's building is a vice principal, and not a fellow servant with such laborers. *Sullivan v. Railway Co.*, 107 Mo. 66, 17 S. W. 748.

A section foreman is not a fellow servant with sectionmen under his orders, in respect to the performance of the master's duty in directing the work in his charge. *Schroeder v. Railway Co.*, 108 Mo. 322, 18 S. W. 1094.

A brakeman of a freight train and the fireman upon another are fellow servants. *Relyea v. Railway Co.*, 112 Mo. 86, 20 S. W. 480.

A brakeman in a switch gang is a fellow servant with the engineer in charge of the switch engine. *Warmington v. Railway Co.*, 46 Mo. App. 159.

Where a brakeman failed to set brakes on cars left on main track, whereby they ran down a grade, and collided with an approaching train, injuring the fireman, it was held that, as to such act, he was the fellow servant of such fireman. *Relyea v. Railway Co.* (Mo. Sup.) 19 S. W. 1116.

Railroad section hands engaged in ballasting the track with stone which is hauled to them on a construction train, and unloaded by the trainmen, are in a common employment with such trainmen, and are their fellow servants. *Parker v. Railway Co.*, 109 Mo. 362, 19 S. W. 1119.

<sup>23</sup> 109 Mo. 350, 19 S. W. 59.

<sup>24</sup> *Schlereth v. Railroad Co.* (Mo. Sup.) 19 S. W. 1134; *Dixon v. Railroad Co.*, 109 Mo. 413, 19 S. W. 413.

"We believe it is conceded on all hands that there are certain duties personal to the master, and for the nonperformance of which, resulting in an injury, he is liable even to a servant. Thus, he must observe due care in furnishing suitable machinery and appliances, in seeing that the machinery and appliances are kept in repair, in the selection of competent and trustworthy servants, in making suitable rules and regulations for the conduct of a complex business, and in seeing that youthful persons receive proper warning. It is often said that the servant intrusted with the performance of those duties personal to the master is not a fellow servant with those engaged in the prosecution of other work; but such statements are misleading, and have been the source of much trouble. The master is liable for a negligent performance of those duties, no matter by or through whom he undertakes to perform them. It is therefore evident that the question as to who are fellow servants, within the rule of exception, cannot be determined from expressions found in those cases which have to deal with some default or alleged default of the master in the performance of some personal duty."<sup>25</sup> In *Parker v. Railway Co.* there is a very elaborate discussion of the doctrine of fellow servants by Justice Black, and also in a dissenting opinion by Justice Thomas. The discussion of the former is a strong plea for the Illinois rule of co-association. He concludes by saying: "Guided by the real reason for the rule, it seems to us it should be applied only in those cases where the servant injured and the one inflicting the injuries are so associated and related in their work that they can observe and have an influence over each other's work, and can report delinquencies to a common correcting power or head. In short, they should be fellow

<sup>25</sup> *Parker v. Railway Co.*, 109 Mo. 362, 19 S. W. 1127.

servants in fact, and not simply in dialectic theory. If in separate, distinct departments, so that the circumstances just stated do not and cannot exist, then they are not fellow servants in any just or fair meaning of the rule. The mere fact that a defective appliance, causing injury, was constructed by a fellow servant, does not relieve the master from liability therefor; but he is not liable if he furnished suitable materials for the appliances, and competent workmen to construct it, and intrusted them with its construction as part of the work which they were employed to perform, and one of them is injured in its construction by reason of a defect therein. All so engaged, as to each other, are fellow servants.”<sup>26</sup>

<sup>26</sup>Jones v. Packet Co., 43 Mo. App. 308.

## CHAPTER XVII.

### FELLOW SERVANTS (Continued).

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**THE RULE IN TEXAS.**

The courts of this state have experienced considerable difficulty within the last few years in formulating or adopting rules relating to the subject under discussion. I do not think they have yet arrived at a satisfactory conclusion.

The general rule as to the master's duties is well adhered to, and also that those servants to whom is delegated the performance of such duties represent the master, who is responsible for injuries occasioned by the neglect of such servants to properly perform the same. That the duty of furnishing reasonably safe premises and appliances, and maintaining them in such condition, the employment of competent servants, and promulgating proper rules where the business is of such a complex character as to require it, is personal to the master, is not questioned; but the difficulty lies in determining as to what employes, when not engaged in performing the duties incumbent upon the

master to perform, are, as to each other, fellow servants, as well as whether the supervision or direction of any particular work is also a duty devolving upon the master, which he cannot delegate so as to relieve him from responsibility for the manner in which it is performed.

As to the first of these propositions, the doctrine of Illinois, Tennessee, Kentucky, and some other states—that those servants who are engaged in different branches or departments of the same general employment are not fellow servants—does not meet with approval. But their approval is withheld upon the ground of former decisions upon the question, and not upon the ground that it is not more consistent with reason and justice. All employes not engaged in performing a master's duty, and not acting in obedience to the master's orders, are engaged in one common employment, and are therefore fellow servants.

In assuming this position, necessarily the rule as to the character of the employment is recognized to some extent. This is manifest from language recently used by the court,—"that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of another,"<sup>1</sup>—as well as by the facts in other cases decided, where the rule was applied, and also by their citing with approval the doctrine of *Crispin v. Babbitt*,<sup>2</sup> to the effect that a servant may be a representative of the company in one relation, and a fellow-servant with co-employes in another. The decided cases referred to were generally those where a servant, whose employment was the performance of some duty personal to the master, was injured while not at the time at work, or riding upon the cars, or engaged in the performance of other duties, or where his injuries were occasioned by the negligence of a servant

<sup>1</sup> *International & G. N. Ry. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 221.

<sup>2</sup> 81 N. Y. 516.

not at the time directly representing or performing the personal duties of the master. Thus, the foreman of a bridge gang upon a railroad, injured by the negligence of operatives of a train, was held to be their fellow servant; while, if the operatives upon the train had been injured by the negligence of such foreman in the performance of his duty in the construction or repair of a bridge, it could not be said they were fellow servants.<sup>3</sup> Also, a railway employé working in a bridge gang was held to be a fellow servant with workmen in the transportation department.<sup>4</sup>

As to the second proposition, the court steadfastly adhere to the doctrine that an employé who has charge of a special department of the company's business, with power to employ and discharge the servants in his department, is not to be deemed the fellow servant of those under his control. It is stated by the court, in a leading case upon the subject, that "a servant who has the authority to employ other servants under his immediate supervision exercises an important function of his master, and has as full control over him as his master would have, were he present acting in person. The subordinate, in such a case, is as much the servant of the agent who employs and controls him as he would be of the master, were the latter discharging the functions of his agent." \*

*The Texas Statute (Laws 1891, c. 24).*

Section 1. All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, who are intrusted by such corporation with the

<sup>3</sup> Gulf, etc., Ry. Co. v. Wells (Tex. Sup.) 16 S. W. 1025.

<sup>4</sup> International & G. N. Ry. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219.

\* Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4, 12 S. W. 835.

A roadmaster in charge of a working train and a working party, though he is clothed with power to employ and discharge men, is a fellow servant with section hand riding thereon under his direc-



authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice principals of such corporation, and are not fellow servants with such employé.

Sec. 2. That all persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together at the same time and place, to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employés, are

tion, but not employed under his immediate eye. *Galveston, H. & S. A. Ry. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562.

Where an engine wiper and night watchman is ordered by the yard foreman in charge of an engine to make a coupling, as to such duty they are fellow servants. Though the foreman had authority generally to discharge such employé, yet in handling the engine he was performing the duty of a fellow servant. *Gulf, C. & S. F. Ry. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. 706.

A railroad employé working in a bridge gang is a fellow servant with workmen in the transportation department, although they have no duties in common, and are under direction of independent superintendents. *International & G. N. Ry. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219.

A conductor upon a gravel train and a laborer on such train are fellow servants. *Corona v. Railway Co.* (Tex. Sup.) 17 S. W. 384.

In order to hold a temporary foreman to be a vice principal, it must appear he had full control of the work, with power to employ and discharge the men. *St. Louis, A. & T. Ry. Co. v. Lemon*, 83 Tex. 143, 18 S. W. 331.

A foreman in the repair department of the shops of a railway company is not the fellow servant of the men under his control. *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835.

An employé charged with keeping a track in repair is not a fellow servant with the employés operating a train on such track; and under this rule it was held that where a switchman is killed at night by stepping from an engine, near a switch he was to operate, upon a pile of cinders negligently left by the track foreman close to the

fellow servants with each other: provided, that nothing herein contained shall be so construed as to make employés of such corporation fellow servants with other employés of such corporation, engaged in any other department or service of such corporation. Employés who do not come within the provision of this section shall not be considered fellow servants.

Sec. 3. No contract made between employer and employé, based upon the contingency of the injury or death of the employé, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding.

track, the company was liable. *Missouri Pac. Ry. Co. v. Bond*, 2 Tex. Civ. App. 104, 20 S. W. 930.

Where an engineer fails to discover a defect in the coupling between an engine and tender, a fireman being injured by such defect, it does not constitute him a fellow servant; this being a duty to be performed by the master, and, in such respect, the engineer representing the master. *Sabine & E. T. Ry. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. 700.

A car inspector and brakeman are not fellow servants. *St. Louis, A. & T. Ry. Co. v. Putnam*, 1 Tex. Civ. App. 142, 20 S. W. 1002.

A master mechanic in charge of a roundhouse of a railroad company, with power to employ and discharge hands, is a vice principal. *Missouri Pac. Ry. Co. v. Sasse* (Tex. Civ. App.) 22 S. W. 187.

A locomotive engineer of one company using the tracks of another company is not the fellow servant of the engineer of the company owning such tracks, where a collision occurs by reason of the latter disobeying instructions of his train dispatcher; such dispatcher also regulating the running of the train upon which plaintiff was engineer. *Texas & P. Ry. Co. v. Easton*, 2 Tex. Civ. App. 378, 21 S. W. 575.

A section foreman, who has full power to employ and discharge the laborers under him, is not their fellow servant. *Gulf, etc., Ry. Co. v. Wells* (Tex. Sup.) 16 S. W. 1025.

Bridge carpenter, given control over work and men, with full power to employ and discharge hands, is with them a fellow servant. *Texas M. Ry. Co. v. Whitmore*, 58 Tex. 276.

### THE RULE IN NORTH CAROLINA.

I find no substantial difference in the rule as applied in this state, as to the master's duty, in respect to furnishing and maintaining reasonably safe appliances for the use of his servants, the employment and retention in service of competent servants, or the promulgation of proper rules, and the rule as applied in New York.

As to fellow servants, the test applied to determine who are such seems to be whether the offending servant had authority from the master to hire and discharge the men under his control. As they state the rule: "A servant intrusted with the general management of the master's business, or those of a particular department, or on detached service, in charge of a train or a body of laborers, is not a fellow servant of those who are employed under him."<sup>5</sup> They indorse to its fullest extent the doctrine of the Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, as generally understood prior to the decision of *Baltimore & O. Ry. Co. v. Baugh*.<sup>6</sup>

The rule is carried to the extent that where such a superintending servant, clothed with such authority, gives a command, which the servant obeys, though it is known by such servant that it is in violation of a rule of the company, or unusually dangerous, his duty being that of obedience, the commanding servant so far represents the master that his command waives such rule, and the order exposing to danger thus becomes personal to the master. Some stress is laid upon the circumstance of the fear the

<sup>5</sup> *Mason v. Railway Co.*, 111 N. C. 482, 16 S. E. 698.

<sup>6</sup> 149 U. S. 368, 13 Sup. Ct. 914.

servant may have of losing his place if guilty of disobedience.<sup>7</sup>

It would seem that the authority of the servant to discharge other servants is not an invariable test. It was held in *Webb v. Railway Co.*<sup>8</sup> that "the fact that a yard-master of a railroad company has authority to discharge a car coupler does not make him any the less a fellow servant of the car coupler." It was stated in *Mason v. Railway Co.*<sup>9</sup> that "the fact that the conductor has the power to employ and discharge brakemen on his train, in the very nature of things, cannot be made the invariable test of the servant's culpability." In connection with such facts, if they exist, or independent of them, if the servant never knows or communicates with a higher official, and receives every order upon which he acts from him, as his superior, he may conclude he has general powers, not only as to command over him, but also to waive rules.<sup>10</sup>

#### THE RULE IN VIRGINIA.

In this state it is said by the supreme court of appeals that an employé who performs or discharges the duties imposed upon the master, no matter what his rank or grade, or by what name he may be designated, cannot be a servant, within the meaning of the rule which exempts the employer from responsibility to one employé for an injury caused by the negligence of another employé who was his fellow servant. "He is an agent, and the rules of law applicable to principal and agent apply; and the

<sup>7</sup> *Patton v. Railway Co.*, 96 N. C. 455, 1 S. E. 863; *Mason v. Railway Co.*, 111 N. C. 482, 16 S. E. 701.

<sup>8</sup> 97 N. C. 387, 2 S. E. 440.

<sup>9</sup> 97 N. C. 387, 16 S. E. 701.

<sup>10</sup> *Mason v. Railway Co.*, 111 N. C. 482, 16 S. E. 701.

liability of the master depends upon whether such duties are negligently performed." Among those duties is that of properly selecting his servants,—to use due and reasonable care in selecting careful and trustworthy employes. In describing the master's duty in this respect, the court say: "He must, on engaging a man, make reasonable investigation into the character, skill, and habits of life of the person. If this is not done, it is negligence, and he may be held liable for an injury to another employé, occasioned either by his negligence, incapacity, or intemperance. Other duties of the master are to make such needful rules and such provision for the safety and protection of the employes as will afford them reasonable protection against the dangers of the service incident to the performance of their respective duties. These duties have been well expressed in *Laning v. Railroad Co.*:<sup>11</sup> "The duty of the master to the servant, and the implied contract between them, is to the effect that the master—First, shall furnish proper and adequate machinery and appliances for his work; second, and shall employ skillful and competent fellow servants, and shall use due and reasonable care to that end. This duty is to be positively and affirmatively fulfilled and performed.'" <sup>12</sup>

I understand from the language thus used, and from the connection in which it is used, that the duties last described and defined by the New York court are such as are required to meet the general statement of the master's duty, which is, "To make such provision for the safety and protection of the employes as will afford them reasonable protection against the dangers of the service incident to the performance of their respective duties."

<sup>11</sup> 49 N. Y. 521.

<sup>12</sup> *Norfolk, etc., R. Co. v. Donnelly's Adm'r*, 88 Va. 853, 14 S. E. 692.

The same court formulate a test of fellow servants: "They are co-employés, engaged in the same department of service, who are thrown together in the performance of a common duty, and having opportunity to observe and judge of the liability and qualifications of each other."<sup>13</sup> In *Moon's Adm'r v. Railroad Co.*<sup>14</sup> the court very clearly defined who were fellow servants. They say: "The fellow servant or co-employé for whose negligence the company is not liable is one who is in the same common employment,—that is, in the same shop, or placed with and having no authority over the one injured,—and who is no more charged with the discretionary exercise of powers and duties imperatively resting upon the master than the injured party; but where a person is placed in charge of the construction or repair of machinery, the dispatching of trains, the maintenance of ways, etc., he is not a fellow servant with those under him, nor with those in a different department of the service. He is the agent of the company, which has assumed through him the performance of duties which are absolute and imperative, the omission or negligent performance of which the law will in no wise excuse."

Even this rule, apparently so exactly stated, must not be construed too strictly. The exact rule is perhaps somewhat broader than the language above used would warrant.

It is held that locomotive engineers employed upon the same road are fellow servants.<sup>15</sup>

They further maintain that employés in different departments of the common employment, though of the same grade, are not fellow servants.<sup>16</sup>

<sup>13</sup> *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211.

<sup>14</sup> 78 Va. 745.

<sup>15</sup> *Norfolk, etc., R. Co. v. Donnelly's Adm'r*, 88 Va. 853, 14 S. E. 694.

<sup>16</sup> *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Richmond & D. R.*

The doctrine of the Ross Case is fully approved as to the relation of a servant in charge of a branch or department of the master's business, and in control of men employed to perform the work. One having such control over others, with authority to command and direct, is an agent of the master, and not the fellow servant of such employés. A conductor of a train is such an agent of the master.<sup>17</sup>

### THE RULE IN MINNESOTA.

The general features of the New York rule are recognized in this state as to the duties of the master,—that is, it is his duty to provide reasonably safe places for his servants to work, and reasonably safe structures, appliances, and instrumentalities for use by his servants, or use due care to that end; that these duties cannot be delegated to the extent of relieving the master from responsibility for injuries caused to a servant by the negligence of one standing in his place in the performance thereof;<sup>18</sup> that difference in grade of employment or in authority, with respect to each other, does not affect or determine their relations as fellow serv-

Co. v. Norment, 84 Va. 167, 4 S. E. 211; Torian's Adm'r v. Railway Co., 84 Va. 192, 4 S. E. 339; Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.

<sup>17</sup> Ayres v. Richmond & D. R. Co., 84 Va. 679, 5 S. E. 582; Johnson's Adm'r v. Richmond & A. R. Co., 84 Va. 713, 5 S. E. 707; Richmond & D. R. Co. v. Williams, 86 Va. 165, 9 S. E. 990; Moon's Adm'r v. Railroad Co., 78 Va. 745.

<sup>18</sup> Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020; Brown v. Railway Co., 31 Minn. 553, 18 N. W. 834.

Brakemen and car inspector are not fellow servants, when former is injured by the negligence of the latter. Fay v. Railway Co., 30 Minn. 231, 15 N. W. 241; Tierney v. Railway Co., 33 Minn. 311, 23 N. W. 229; Macy v. Railroad Co., 35 Minn. 200, 28 N. W. 249.

Foreman and laborer employed about company's tracks are not fellow servants, where former directed latter to go into a building

ants, so far as the liability of the master for injuries caused to one by the negligence of another is concerned; that the employé assumes the risks from negligence of those serv-

partially destroyed by fire, and was injured by the building being insecure. *Cook v. Railway Co.*, 34 Minn. 45, 24 N. W. 311.

Foreman and laborers under him are fellow servants while engaged in building a trestle. *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020.

It is not the rank of an employé, or his authority over other employés, but the nature of the duty or service he performs, which determines whether he is a vice principal or fellow servant. When performing a duty resting upon the master absolutely, he represents the master, and stands in his place, to the extent of the discharge of that duty, but as to all other matters he is a mere co-servant with other employés. *Id.*

This case is distinguished from *Cook v. Railway Co.*, *supra*, by the fact that in the latter the servant was ordered temporarily to perform a dangerous service without the scope of his employment. In the former the work being performed was not a structure of itself furnished to work on, but was itself a part of the work the servants were employed to perform,—a thing which they themselves made, and was as much a part of the construction of the road as was digging in the pit, loading cars, driving teams, or tramping dirt on the dump.

This construction finds support in the following cases: *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *Peschel v. Railway Co.*, 62 Wis. 338, 21 N. W. 269; *Gallagher v. Piper*, 16 C. B. (N. S.) 669.

Foreman of a roundhouse and truck packer are fellow servants, although the latter is subject to the orders of the former. *Gonsior v. Railway Co.*, 36 Minn. 385, 31 N. W. 515.

Foreman of section and sectionmen are fellow servants. *Olson v. Railway Co.*, 38 Minn. 117, 35 N. W. 866.

The question of who are fellow servants does not depend upon rank or grade, but upon the nature of the service required of them. *Fraker v. Railway Co.*, 32 Minn. 54, 19 N. W. 349; *Brown v. Railway Co.*, 31 Minn. 553, 18 N. W. 834; *Id.*, 27 Minn. 162, 6 N. W. 484; *Tierney v. Railway Co.*, 33 Minn. 311, 23 N. W. 229.

Where the general work in which several servants are engaged



ants who may be placed over him as superior servants or overseers, as well as those of equal grade with himself, for, in respect to such overseers or superior servants, the master, when he used due care in selecting them, cannot pre-

includes the construction or preparation of the appliances with which they are to work,—as where, in erecting a building, they construct a scaffold,—they are fellow servants, in respect to the negligence of one of them in constructing such appliances, as well as in respect to negligence in doing any other part of their work. *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611.

Roadmaster and sectionmen are fellow servants. *Brown v. Railway Co.*, 27 Minn. 162, 6 N. W. 484.

Sectionman and those engaged in running trains are fellow servants. *Foster v. Railway Co.*, 14 Minn. 360 (Gil. 277); *Connelly v. Railway Co.*, 38 Minn. 80, 35 N. W. 582. This was held where the former was injured by the negligence of the latter.

In *Drymala v. Thompson*, 26 Minn. 40, 1 N. W. 255, it was held that a section foreman, charged with keeping the track in repair, was not a fellow servant of a brakeman on a train. In this case the brakeman was injured by the former's neglect in the matter of keeping in repair the track. The distinction between the cases is that in the latter, as regards the repair of the track, the section master was performing a duty personal and absolute on the master.

The duty to light a headlight on an engine, where an employé is injured upon a track, is that of a fellow servant. *Collins v. Railroad Co.*, 30 Minn. 31, 14 N. W. 60.

Baggage master and switch tender are fellow servants. *Roberts v. Railway Co.*, 33 Minn. 218, 22 N. W. 389.

Station agent and engineer are fellow servants, where the former has general charge of tracks in and about his station. So held where such agent negligently left cars standing on main track. *Brown v. Railway Co.*, 31 Minn. 553, 18 N. W. 834.

A master furnishing unsafe machinery to a servant for use is not relieved from liability for injury to another servant, caused by negligence in its use by the servant to whom it was furnished. *Ransier v. Railway Co.*, 32 Minn. 331, 20 N. W. 332. See, also, *Sherman v. Lumber Co.*, 72 Wis. 122, 39 N. W. 365.

If negligence of master and servant combine in contributing to

vent their casual negligence, any more than he can prevent the casual negligence of those inferior in grade;<sup>19</sup> that an employé becomes a vice principal, as respects another, only when he is intrusted with the performance of some absolute duty of the master himself, such as the providing of proper instrumentalities with which the service of an employé is to be performed, or the general control and management of the master's business, or some branch of it;<sup>20</sup> that the question whether the negligent employés were vice principals or fellow servants depends, not upon their grade or rank, but upon the nature of the service which they perform.<sup>21</sup>

All those who are engaged in the construction of a road or appliances are fellow servants, without regard to rank, grade, or department of service. They are all serving the

the injury, the master is liable. *Franklin v. Railroad Co.*, 37 Minn. 409, 34 N. W. 808.

Where a tool that is obviously defective is selected by a servant for certain work, though like tools in proper condition were furnished, which he might have used, the master is not liable to another servant thereby injured. *Hefferen v. Railroad Co.*, 45 Minn. 471, 48 N. W. 1, 526; *Ling v. Railway Co.*, 50 Minn. 160, 52 N. W. 378.

Servants engaged in excavating a trench for a city, and other servants working in connection, whose duty it was to put in curbing as they saw the need of it, are fellow servants. *Bergquist v. City of Minneapolis*, 42 Minn. 471, 44 N. W. 530.

Inspector and car coupler are not fellow servants. *Tierney v. Railway Co.*, 33 Minn. 311, 23 N. W. 229.

A scaler in a millyard and those engaged in piling lumber, who use an unsound board for steps, others that are sound being present, are fellow servants. *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785.

<sup>19</sup> *Brown v. Railway Co.*, 27 Minn. 162, 6 N. W. 484.

<sup>20</sup> *Brown v. Railway Co.*, 31 Minn. 553, 18 N. W. 834.

<sup>21</sup> *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1022.

same master, under the same control, and all engaged in the same general work. A distinction is thus made between structures and appliances which are being constructed as a part of the general work, and structures and appliances furnished by the master in the first instance for the use of the employés. In the former case the master's duty is performed when his foreman, to whom he has delegated his authority with respect to employing competent men and suitable materials for the work, has properly performed that duty. As to the manner in which the work is afterwards performed, all who are engaged in performing it are fellow servants.<sup>22</sup>

As to those servants who are engaged in making repairs upon appliances, they are as much representatives of the master as those who, in his place, furnish such appliances in the first instance, so far as those employés who are to use them after such repairs have been made is concerned. The duty to furnish reasonably safe appliances includes the care and duty of maintaining them in such condition.<sup>23</sup> But such rule has no application as between those who are engaged in making such repairs, and where the master furnishes materials suitable for the work, to be selected and used by some of the servants, such as pertain to the mere detail of the work.<sup>24</sup>

The liability of railway corporations to one employé injured by the negligence of another is declared by statute,<sup>25</sup> which reads as follows: "Every railroad corpora-

<sup>22</sup> *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1022; *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785.

<sup>23</sup> *Anderson v. Railway Co.*, 39 Minn. 523, 41 N. W. 104.

<sup>24</sup> *Ling v. Railway Co.*, 50 Minn. 160, 52 N. W. 378; *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785; *Brown v. Railway Co.*, 27 Minn. 162, 6 N. W. 484; *Gonslor v. Railway Co.*, 36 Minn. 385, 31 N. W. 515; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1022.

<sup>25</sup> Chapter 13, Laws 1887.

tion owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained in this state; and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability; provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employé, agent, or servant while engaged in the construction of a new road, or any part thereof not open to public travel or use." The construction placed upon this act by the courts is similar to the construction of a somewhat similar law of the state of Iowa by its courts, and that is that its effect and operation is limited to corporations operating railways, and to that part of their business.<sup>26</sup>

#### THE RULE IN COLORADO.

In stating and defining the duties personal to the master, the supreme court of Colorado lay down the following propositions:

"First. In the purchase of safe machinery and appliances for use in his business, the master is required to use ordi-

\* *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. 974.

The statute only applies to those employés engaged in operating railroads, and so exposed to the peculiar dangers attending the business. *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. 974. So held where the draw of a bridge was open and left unfastened by a fellow servant, and was blown shut, causing injury, and that plaintiff could not recover. *Johnson v. Railroad Co.*, 43 Minn. 223, 45 N. W. 156.

The same where a crew of sectionmen were engaged in loading railroad iron from the ground onto a flat car. *Pearson v. Railway Co.*, 47 Minn. 9, 49 N. W. 302.

A section hand whose duties require the use of a hand car, injured

nary care and diligence; such care and diligence having reference to the hazards of the employment, and being proportioned to the danger of the service. If, through the want of ordinary care in this respect, unsafe or defective machinery is procured, and the servant, without fault on his part, is injured, the master is liable.

“Second. The master is likewise charged with the further duty of maintaining in suitable condition the machinery and appliances used in his business. In this regard he is also required to exercise ordinary care and diligence, and is liable for injuries resulting from his ordinary negligence to the servant without fault on the latter’s part; the question as to what shall constitute such ordinary care having reference likewise to the danger which the service naturally imposes upon the employé.

“Third. Agents charged with the duty of procuring safe machinery, or agents charged with the duty of inspecting and keeping machinery and appliances in suitable repair, are not to be regarded as fellow servants with those employed to labor in the business wherein such machinery or appliances are used, or, in some cases, even with those engaged to operate the same. The master is liable for injuries resulting, without contributory negligence, to other servants, through the ordinary negligence of his employé

by a fellow servant in its use, is within the statute. *Steffenson v. Railway Co.*, 45 Minn. 355, 47 N. W. 1068.

A railroad company operating a line composed of the lines of different companies is within the statute. *Moran v. Railway Co.*, 48 Minn. 46, 50 N. W. 930.

Work done in constructing a yard with tracks in it, to be used as a part of a railroad already open to the public, is not the construction of a new road, or any part thereof, within the meaning of the statute (*Id.*), nor in operating an engine hauling cars on a temporary track for the purpose of filling in low land for a yard in St. Paul (*Schneider v. Railroad Co.*, 42 Minn. 68, 43 N. W. 783).

or agents thus charged with the duty of procuring or repairing, whether such negligence be in originally failing to purchase safe machinery or appliances, or in failing to keep the same in proper condition for use." <sup>27</sup>

From this language, perhaps, it might be inferred that the New York rule was intended to be expressed to the extent that those engaged in the work of repairs were agents or representatives of the master, performing his imperative and absolute duty; yet I am inclined to consider that a rule or doctrine more nearly in accord with that prevailing in Massachusetts and New Hampshire was intended. It is very clear that any employé, without regard to grade or rank, who purchases or procures for the master in the first instance machinery and appliances, is to be considered the agent of the master in this respect; that the foreman in the shops where repairs are made, whose duty it is to inspect or test and determine the sufficiency and safety of such appliances when repaired, is also the agent of the master, and not the fellow servant of those working in the business where the appliances are used. For instance, if a machine thus repaired was, by reason of neglect of the employé whose duty it was to inspect or test it as to safety, defective and unsafe, or cars were defective from the same cause, thereby causing injury to any servant employed in the general business, the master would be liable. As to such matters of inspection, test, and discretion, such employé is an agent representing the master. But those who perform the labor upon such a machine or appliance, not being charged with the duty of inspection and test, and exercising no discretion in the matter, are fellow servants with each other, and with those who work in the business where the machine or appliance is used. In short, the department theory is not followed.

<sup>27</sup> Wells v. Coe, 9 Colo. 159, 11 Pac. 50.

The master's duty in respect to employment and retention of competent servants is the same as is required of him in other states.<sup>28</sup>

One clothed with the control and management of a distinct department, in which his duty is entirely that of direction and superintendence, is an agent and the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. A conductor of a train is such an agent. The conclusion is reached by reason of such an employé performing the master's duty of supervision and direction, rather than by reason of his powers of control. The doctrine of *Chicago, M. & St. P. Ry. Co. v. Ross*<sup>29</sup> is approved.<sup>30</sup>

#### THE RULE IN WISCONSIN.

The early decisions in this state are not consistent. The doctrine of the assumption of the risks of negligence by a fellow servant was at first recognized.<sup>31</sup> Then later, in the same case, the doctrine was not sustained; it being held that a brakeman could recover for an injury caused by the negligence of the engineer.<sup>32</sup>

Subsequently the court returned to its first position, and held that an employé cannot recover of his employer for an injury occasioned by the negligence of another employé en-

<sup>28</sup> *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1038.

<sup>29</sup> 112 U. S. 390, 5 Sup. Ct. 184.

<sup>30</sup> *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. 249; *Denver, etc., R. Co. v. Discoll*, 12 Colo. 520, 21 Pac. 708.

<sup>31</sup> *Chamberlain v. Railway Co.*, 7 Wis. 425.

<sup>32</sup> *Chamberlain v. Railway Co.*, 11 Wis. 238.

A lumber dealer was held not liable for an injury to an employé caused by the negligence of a mere foreman in his yard; such foreman not being intrusted with the whole power and authority of the master or his duties. Under such conditions the foreman was

gaged in the same business.<sup>33</sup> In the latter case it appeared that a brakeman was killed, by the cars violently coming together, caused by some rails being removed. At this time it is very evident that no distinction was either urged or considered between employes engaged in repairing the track and those engaged in operating trains. They were held to be fellow servants.

Still later, it was held that a brakeman could not recover for an injury caused by the negligent removal of rails from

a fellow servant with the injured employe. *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219.

That the principal resides in another state does not alter the rule. *Id.*

An employe engaged in unloading gravel and surfacing the track is a fellow servant of the conductor of the gravel train. *Heine v. Railway Co.*, 58 Wis. 525, 17 N. W. 420.

Brakeman and conductor are fellow servants. *Pease v. Railway Co.*, 61 Wis. 163, 20 N. W. 908.

Brakeman and engineer are fellow servants. *Fowler v. Railway Co.*, 61 Wis. 159, 21 N. W. 40.

Master and mate of a vessel are fellow servants. *Mathews v. Case*, 61 Wis. 491, 21 N. W. 513.

A foreman in charge of an appliance, such as a pile driver, who is authorized to employ men to work thereon, and to discharge them, and charged with the duty of keeping such machine in repair, is not a fellow servant with such employes, when injury is caused by the neglect of such foreman in keeping the appliance in repair. *Schultz v. Railway Co.*, 48 Wis. 375, 4 N. W. 399.

A track walker and a foreman are fellow servants. *Id.*, 67 Wis. 616, 31 N. W. 321.

The owners of a steam sawmill, who employed competent workmen to put in a steam pipe, and who had knowledge that it was not sufficiently screwed into the cylinder, are not responsible for an injury caused by that defect to an employe engaged in taking it apart for repairs. *Hobbs v. Stauer*, 62 Wis. 108, 22 N. W. 153.

An employe whose duty it is to watch for the safety of an em-

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<sup>33</sup> *Moseley v. Chamberlain*, 18 Wis. 700.



the track by other servants of the company, not in any way connected with the running of the train, and their failure to give proper notice to the coming train.<sup>34</sup> Here, again, no consideration was given to the fact that the offending servants were engaged in repairing the track. The gravamen of the complaint was that the company was negligent in not keeping its road in a safe condition, in not giving proper notice, in not employing sufficient workmen, and in not employing a competent and trustworthy superintendent

ployé working under a car upon the track is the fellow servant of the latter, when injured by the neglect of the former, to warn him of an approaching train. *Luebke v. Railway Co.*, 63 Wis. 91, 23 N. W. 136.

A foreman personally engaged in calking water pipes is the fellow servant of a volunteer called by him to assist. *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. 807.

Where the master has furnished for his servants planks of sufficient strength and size to be used as a temporary bridge for use of such workmen, and one plank selected by a fellow servant was defective, such act is that of a fellow servant of such workmen. *Van den Heuvel v. National Furnace Co.*, 84 Wis. 636, 54 N. W. 1016.

Brakeman and general manager are not fellow servants. *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544.

Brakeman and train dispatcher are not fellow servants. *Id.*

Brakeman and section boss are not fellow servants, where former is injured. *Hulehan v. Railroad Co.*, 68 Wis. 520, 32 N. W. 529.

Employés of leased road are not fellow servants of the employés of the company leasing it, though subject to the orders of the latter company while running on its tracks. *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544.

Station agent and train operatives are fellow servants. *Toner v. Railway Co.*, 69 Wis. 188, 31 N. W. 104, and 33 N. W. 433; *Rains v. Railway Co.*, 71 Mo. 164; *Mexican Cent. Ry. Co. v. Shean* (Tex. Sup.) 18 S. W. 151; *Gaffney v. Railroad Co.*, 15 R. I. 456, 7 Atl. 284; *Brown v. Railway Co.*, 31 Minn. 553, 18 N. W. 834; *Hodgkins v. Railway Co.*, 119 Mass. 419.

<sup>34</sup> *Cooper v. Railway Co.*, 23 Wis. 668.

to make the repairs. It is true, Justice Paine dissented upon the distinct ground that the servants so employed were engaged in different departments of the service, and therefore were not fellow servants; but the majority of the court, in their opinion at least, refused to apply that rule, but rather adopted the rule—akin to that established in Massachusetts—ignoring the department theory, and holding that the master's duty was met when he employed a sufficient number of competent men to perform the service, and suitable material for their use; and therefore the only question considered was as to the evidence upon that question. This must be true, for they say: "The negligence of the company, its officers or agents, in employing careless and unfit servants, is the gist of the action. Unless that be shown, there can be no recovery."

In *Brabbitts v. Railway Co.*<sup>35</sup> the court took decided ground as to the proper rule, and adopted that which it has followed since, excepting in one or two cases hereafter discussed. It was declared that the master owed to his servants certain duties, the performance of which he could not delegate to another, so as to relieve himself from the consequence of their negligent performance. Among these duties was that of providing reasonably safe appliances for his servant's use, and, as applied to the case in question, to keep in proper repair the engine used to propel the train upon which plaintiff was employed.

In *Bessex v. Railway Co.*<sup>36</sup> it was held "that the company owed its employes the duty of providing a suitable place for doing their work; and the neglect of an employé of the company, whose duty it was to see that the place where its employes were required to do their work was kept in a suitably safe condition, was the neglect of

<sup>35</sup> 38 Wis. 280.

<sup>36</sup> 45 Wis. 477.

the company, for which it was liable to an employé who was injured by such neglect."

The master does not guaranty the safety or fitness of his machinery or appliances, or that no harm will result from their use. In respect to their use, his duty is that he must use ordinary care in selecting men who are competent to work and manage such machinery and appliances, and he does not guaranty his employés that the men so employed by him will in all cases use the utmost care in their use.<sup>37</sup>

The distinction which some of the courts have drawn in favor of the employé who, by the nature of his employment, is under the orders or direction of some other employé as to the way or manner in which he shall perform his part of the common work in hand, and holding that employés having such relations to each other are not co-employés, within the meaning of the law, and that the principal is liable for an injury resulting to the subordinate employé through the negligence of such superior, has not been adopted in this state.<sup>38</sup>

It was, however, held in *Johnson v. First Nat. Bank*<sup>39</sup> that a superintendent or foreman having charge of the construction of a building, having power to hire and discharge laborers and to direct their work, was not a fellow servant of such laborers, but a vice principal. The doctrine is not discussed, but the mere naked statement made that such is the law. To what extent the doctrine may be applied, of course, is uncertain. As applied to the facts

<sup>37</sup> *Heine v. Railway Co.*, 58 Wis. 531, 17 N. W. 420.

<sup>38</sup> *Heine v. Railway Co.*, 58 Wis. 531, 17 N. W. 420; *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219; *Howland v. Railway Co.*, 54 Wis. 220, 11 N. W. 529; *Dwyer v. American Exp. Co.*, 82 Wis. 307, 52 N. W. 304.

<sup>39</sup> 79 Wis. 414, 48 N. W. 712.

of that case, it probably does not conflict with the generally accepted rule; but as a general proposition, relating to foremen in charge of a particular work, it would present a serious conflict.

In *Heine v. Railway Co.*, *supra*, the court say, in speaking of the master's duties as to safe ways and places: "The duty to see to its performance rests upon the company, notwithstanding it has appointed a suitable person or persons, whose duty to the company is to see that such duty is performed. It is a duty that cannot be evaded by the appointment of a suitable agent to perform the same. The duty of performance rests upon the company as much after the appointment of such agent as it did before; and the neglect of the agent is therefore attributed to the principal."

In *Hulehan v. Railroad Co.*<sup>40</sup> the court say that the question whether negligence in keeping the roadway in a safe and suitable condition is chargeable upon the company, or upon the servants whose duty it is to maintain it, in case an operative is injured, is not an open question in this state.

*Brabbitts v. Railway Co.*<sup>41</sup> and *Schultz v. Railway Co.*<sup>42</sup> were decided upon the distinct ground that the offending servants represented the master in the performance of the master's personal duty, and not on the ground of their rank or power to control.

From the foregoing cases and the reasoning of the court, we would have but little difficulty in formulating, if the court had not done so, a rule which, in all essentials, would correspond with the rule established by the New York court. Unfortunately, however, we are met with

<sup>40</sup> 68 Wis. 526, 32 N. W. 529.      <sup>41</sup> 38 Wis. 289.

<sup>42</sup> 48 Wis. 375, 4 N. W. 399.

the language of the chief justice in deciding a motion for rehearing in *Toner v. Railway Co.*,<sup>43</sup> which not only casts a doubt upon the doctrine of the later of the above cases, but makes it uncertain what, if any, rule is recognized. The language referred to emphatically approves of the doctrine asserted in *Cooper v. Railway Co.*,<sup>44</sup> which in effect was, as before stated, that common employment includes all engaged in a common service, without distinction as to those employes who are engaged in performing the master's duties in maintaining suitably safe premises and appliances,—in other words, making no distinction between those who maintain them and those who use them; that in all branches of the service the master's duty is met when he has employed a sufficient number of competent servants. The inconsistency of such a rule with the doctrine so often previously announced is very apparent. In subsequent cases, however, the doubt thus created has been dispelled, and the rule which prior cases had so strongly declared was reiterated in language that cannot admit of doubt.

In the recent case of *McClarney v. Railway Co.*<sup>45</sup> the court say: "It would hardly seem necessary to state that it was the duty of the defendant to keep its track free from obstructions which render the moving of cars upon it dangerous to its employes, and that the company is under obligations to see that this duty is performed by some one. This is a duty or implied contract which the master must perform himself, or by some other, and until it is performed his duty from the implied contract is not kept or fulfilled."

In *Dwyer v. American Exp. Co.*<sup>46</sup> the court very pointedly

<sup>43</sup> 69 Wis. 188, 31 N. W. 104, and 33 N. W. 433.

<sup>44</sup> 23 Wis. 668.

<sup>45</sup> 80 Wis. 278, 49 N. W. 963.

<sup>46</sup> 82 Wis. 307, 52 N. W. 304.

state the rule: "Whether the relation of co-employé or fellow servant exists between different employés engaged in the same business, for the same employer, is not determined by the rank or grade of either servant, but by the character of the act being performed by them. If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending employé is not a servant, but an agent; but as to all other acts they are fellow servants." They further state that *Brabbitts v. Railway Co.*, supra, was decided by the application of this rule; that it can make no difference how humble or subordinate the employment of the offending servant may be; that the real effect of the rule is to make any servant of the company, who is charged with the performance of any duty which the master owes to its servants, a vice principal in respect to such duty; that the case of *Schultz v. Railway Co.* affords an apt illustration of an application of this rule.

In *Hulehan v. Railway Co.*<sup>47</sup> this rule was applied; yet in the subsequent case of *Toner v. Railway Co.*, supra, the court say that the true ground upon which that decision was based was that of the negligence of the company in permitting the obstructions to remain such a length of time that notice was presumed.

In *Toner v. Railway Co.*, supra, it was held that a station agent, whose duty it was to see that the tracks at his station were kept free from obstructions, was, even as to such duties, a fellow servant with a train employé. The obstruction there was a car moved by a violent windstorm upon or near the main track. It has been held in Minnesota and some other states that such an agent, though charged with similar duties, is a mere servant; that his

<sup>47</sup> 68 Wis. 526, 32 N. W. 529.

duties pertain to the movement and operation of trains, unloading of freight, etc., and not to the appliances.

It is perfectly consistent to hold that, so long as there were others whose duty it was to look after the condition of the permanent structures, the station agent's duties in respect to obstructions related to those of a temporary character which might impede the passage of trains, and that his duties in this respect were of a similar character to those required of a switch tender or an ordinary car repairer. If a freight conductor had temporarily, yet negligently, left the main track obstructed with cars, it would not be contended for a moment but that his act in that respect was the act of a servant.

So it may well be said that, with the exception of what was said in the Toner Case, the decisions of this court upon the question under discussion, commencing with the case of *Brabbitts v. Railway Co.*, have been consistent.

In this state the court is committed to the rule that an employé, when using the premises or ways of the company in going directly to and returning from his work, whether on foot or riding upon the master's trains, is at such times, and under such circumstances, to be considered in the service of the master, to the extent that if he receive injury through the negligence of other employés in operating such trains, or in the use of such premises, the master is not responsible to him therefor.<sup>48</sup>

This doctrine may be said to be of general application in this country, though, under some peculiar conditions existing, cases may be found which seem to hold a contrary view. If the employé was liable to pay fare, or by the terms of his employment it could be exacted of him, then a different rule would prevail. The character of the

<sup>48</sup> *Ewald v. Railway Co.*, 70 Wis. 420, 36 N. W. 12, 501.

employment which such employé is engaged to perform does not enter into consideration. He becomes at such times, and under such circumstances, a fellow servant of employé's negligently causing him injury.

The cases in other states cited in footnote,<sup>49</sup> among many others, support the foregoing statement of the rule.

A person who voluntarily assists, and without expectation of remuneration, in the performance of a work, at the request of the master or his representative for the time being, thereby becomes a servant, subject to the same protection, and assuming the same risks, as one regularly employed.<sup>50</sup>

It is perhaps unnecessary to state, as the rule prevails everywhere, that it is the duty of the master to provide a sufficient number of competent servants to perform the work required in a reasonably safe manner.<sup>51</sup>

In 1875 the legislature enacted a co-employé law, which was as follows: "Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, or when such agent or servant is a resident of, and his contract of employment

<sup>49</sup> *Gilman v. Eastern R. R.*, 10 Allen, 233; *Gillshannon v. Stony B. R. R.*, 10 Cush. 228; *Seaver v. Boston & M. R. R.*, 14 Gray, 466; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Higgins v. Railroad Co.*, 36 Mo. 418; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. 83; *Russell v. Railway Co.*, 17 N. Y. 134; *McQueen v. Railway Co.*, 30 Kan. 689, 1 Pac. 139; *Vick v. Railway Co.*, 95 N. Y. 267; *Ross v. Railroad Co.*, 5 Hun, 488.

<sup>50</sup> *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356; *Street Ry. Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333.

<sup>51</sup> *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823.



was made in, this state; and no contract, rule, or regulation between any such corporation and any agent or servant shall impair or diminish such liability.”<sup>52</sup>

This statute was repealed by chapter 232, Laws 1880; the common-law rule being in force until 1889, when the following act was passed: “Every railroad corporation doing business in this state shall be liable for damages sustained by any employé thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yardmaster, conductor, or engineer, or of any other employé who has charge or control of any stationary signal target, point, block, or switch.”<sup>53</sup>

This act was repealed in 1893, and the following law enacted: “Every railroad or railway company operating any railroad or railway, the line of which shall be, in whole or in part, within this state, shall be liable for all damages sustained within this state by any employé of such company, without contributory negligence on his part. First. When such injury is caused by any defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employés in and about the business of such employment, when such defect could have been discovered by such company by reasonable and proper care, tests, or inspections; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. Second. Or while such employé is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars, and while engaged in the performance of his duty as such employé, and while such injury shall have been caused by the carelessness or negligence of any other employé, officer, or agent of

<sup>52</sup> Chapter 173, Laws 1875.

<sup>53</sup> Chapter 438, Laws 1889.

such company in the discharge of, or for failure to discharge, his duties as such. No contract, receipt, rule, or regulation between any employé and a railroad company shall exempt such corporation from the full liability imposed by this act." <sup>54</sup>

<sup>54</sup> Chapter 220, Laws 1893, approved April 17, 1893.

## CHAPTER XVIII.

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**THE RULE IN KENTUCKY.**

The doctrine early established in this state, and which has continued without material change, is peculiar in many respects. The rule first declared in Louisville & N.

Ry. Co. v. Collins,<sup>1</sup> was that "a subordinate in the same service could recover for the negligence of agents who had the right and power to direct and control him, or who were his superiors, with reference to the discharge of the duties pertaining to the work."<sup>2</sup>

Those employés who have control over any portion of the master's work, with authority to direct subordinates as to the manner of its performance, are considered agents, and the master is responsible for their negligent acts whereby another is injured. Say the court in Louisville & N. Ry. Co. v. Collins:<sup>3</sup> "He is responsible for the negligence or unskillfulness of such an employé, and that responsibility is graduated by the classes of persons injured. As to strangers, ordinary negligence is sufficient; as to subordinate employés associated with such superior servant in conducting the employment, the negligence must be gross; but as to employés in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient."

Among common laborers constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental, but independent, service, no one of them, as between himself and his co-equals, is the master's agent. They are agents of each other. The implied understanding between the master and servant in the same class of service does not, however, exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another of them.<sup>4</sup>

<sup>1</sup> 2 Duv. 117.

<sup>2</sup> Louisville, C. & L. R. Co. v. Cavens, 9 Bush, 566.

<sup>3</sup> 2 Duv. 117.

<sup>4</sup> Louisville & N. R. Co. v. Collins, 2 Duv. 117; Same v. Robinson, 4 Bush, 509; Louisville, C. & L. R. Co. v. Cavens, 9 Bush, 566; Same v. Filbern, 6 Bush, 574.

Gross neglect is either an intentional wrong, or such a reckless disregard of security and right as to imply bad faith, and therefore squints at fraud, and is tantamount to the "magna culpa" of the civil law, which in some respects is quasi criminal.<sup>5</sup>

Willful neglect, equivalent to intentional wrong, or a recklessness evidencing the absence of all care and precaution for the safety and protection of others, is quasi criminal.<sup>6</sup>

Whether or not willful neglect is the same as gross neglect in any case, more or less culpable, it must involve either an intentional wrong or such a reckless disregard of security and right as to imply bad faith.<sup>7</sup>

The rule is applied to the extent that an engineer on one train, who is injured by the negligence of the conductor upon another train, is not a fellow servant of the latter; that the conductor is the agent of the master in controlling the movements of his train. But it was said that if such engineer had been on the same train with the conductor, and in a condition, by reason of his equality with him as an employé, to watch over and provide against his negligence, the reason then for refusing to make the company liable would apply.<sup>8</sup>

#### THE RULE IN WYOMING.

It is difficult to state with any degree of certainty an exact rule in this territory. The only case bearing upon the subject which the writer has examined is *McBride v. Union Pac. Ry. Co.*<sup>9</sup> From this it is quite evident the doc-

<sup>5</sup> *Louisville & N. R. Co. v. Robinson*, 4 Bush, 509.

<sup>6</sup> *Louisville, etc., Canal Co. v. Murphy*, 9 Bush, 531.

<sup>7</sup> *Louisville & N. R. Co. v. Filbern*, 6 Bush, 580.

<sup>8</sup> *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush, 567.

<sup>9</sup> 3 Wyo. 247, 21 Pac. 687.

trine of *Chicago, M. & St. P. Ry. Co. v. Ross*<sup>10</sup> meets with approval as to the questions involved and decided therein. A mere foreman in charge of a gang of men is their fellow servant; but when he is intrusted with superintendence of a branch or department of the master's business, he is a vice principal. The language used in *Hannibal & St. J. Ry. Co. v. Fox*<sup>11</sup> is quoted approvingly, which seems to advance the doctrine that an employé who has charge and supervision over a branch of the service, including control over the men employed, is exercising a duty pertaining to the master, but not that foremen, merely exercising duties which ordinarily pertain to them as such, are so engaged, or so represent the master. It is, however, applied to a conductor, upon the reasoning stated in the *Ross Case*.

The master's duties, and the relation of agents who represent the master in their performance, are evidently held to be of the same character as stated by the rule of the federal court.

#### THE RULE IN LOUISIANA.

The duties on the part of the employer, and the relation of his servant representing him in the performance thereof, are substantially the same as in New York, with the possible exception of his duty as to repairs, and as to those engaged in making or working upon them. As to the latter, no expression has come from the courts indicating their views.

As to who are fellow servants, and the tests applied to determine this relation, the courts adopt the decision of *Chicago, M. & St. P. Ry. Co. v. Ross*, as expressive of the true doctrine. Possibly, they intend to go beyond the result declared in that case, and to the full extent of

<sup>10</sup> 112 U. S. 377, 5 Sup. Ct. 184.    <sup>11</sup> 31 Kan. 597, 3 Pac. 320.



the reasoning of the court therein, and adopt the doctrine of superior and subordinate. This view is suggested by language used in reference to the limitation applied in the Ross Case, as follows: "No doubt, this principle might receive extension to other relations between officers having the right to command and subordinates subject to such command."<sup>12</sup>

### THE RULE IN ARIZONA.

The only case bearing directly upon the question in this state seems to indicate a preference for the Illinois rule. It refers approvingly to the Ross Case, yet leaves the whole matter undecided, hoping, as they say, the courts of the states will be able to settle the complicated question.<sup>13</sup>

### THE RULE IN RHODE ISLAND.

In this state the court states that the duty of the master to furnish suitable machinery and appliances, and to keep the same in repair, is unquestioned. It is also well settled in this state that, when a master delegates to a servant duties which belong to himself, the servant will occupy the place of the master, and not that of a fellow servant with other employés; and the master will remain as responsible for the negligence of this servant as if he were personally guilty of it himself.

The court criticise the Illinois rule, and say that the master is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied con-

<sup>12</sup> *Towns v. Railway Co.*, 37 La. Ann. 632, 55 Am. Rep. 508; *Faren v. Sellers*, 39 La. Ann. 1011, 3 South. 363.

<sup>13</sup> *Hobson v. Railway Co. (Ariz.)* 11 Pac. 545.

tract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. Negligence among workmen is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care required of him.

Servants under the same master in a common service are fellow servants, although they may be engaged in different departments of labor.<sup>14</sup>

In determining the relations of a station agent to a brakeman injured by his neglect, the court adopted the reasoning of the supreme court of Minnesota in *Brown v. Railway Co.*,<sup>15</sup> and that of *Hodgkins v. Railway Co.*,<sup>16</sup> where it was held that a station agent was not a vice principal, nor engaged in the performance of personal duties owed by the master, even though the alleged negligence was in the manner in which lumber was piled, under the supervision of such agent, being so close to the track as to cause injury to such brakeman. In Minnesota the decision was placed upon the grounds that the master is not liable, by reason of any personal duty on his part, for the improper use of proper instrumentalities by a servant, causing injury to another; and that the station agent does not ordinarily exercise general control or management of the company's business, or a branch thereof. He is simply charged with special duties as to his station. His duty is simply that of an operative. One employed becomes a vice principal, as respects another, only when he is intrusted with the performance

<sup>14</sup> *Brodeur v. Valley Falls Co.*, 16 R. I. 448, 17 Atl. 54.

<sup>15</sup> 31 Minn. 553, 18 N. W. 834.

<sup>16</sup> 119 Mass. 419.

of some absolute and personal duty of the master himself,—such as the providing of proper instrumentalities with which the service of an employé is required to be performed,—or with the general management and control of the master's business, or of some branch of it. In Massachusetts the general rule is that, where a master has furnished suitable materials and competent servants to perform the work, his duty is met, and it recognizes only to a very limited extent that one having control over other servants is a vice principal.

In the case under discussion, in Rhode Island, the court uses the following language: "The station agent had charge and direction of the premises and unloading of freight. The lumber was piled beside the track, under his direction and authority. But he was not a vice principal. He had no authority over the plaintiff. He could neither hire him nor discharge him; nor was the plaintiff, so far as it appears, subject to his orders. Both were engaged in a common employment, serving a common principal, and both were under the same general control. Their duties and authority were different, but they were still fellow servants."<sup>17</sup> This language is consistent with any of the different rules that have been adopted in the different states.

#### THE RULE IN NEBRASKA.

The Ohio doctrine is adopted in this state. The court approved of the language used by Judge Raney, in *Cleveland, C. & C. R. Co. v. Keary*,<sup>18</sup> in unmistakable terms, and stated that the law thus established and laid down in Ohio prevails substantially throughout the western states,

<sup>17</sup> *Gaffney v. Railway Co.*, 15 R. I. 456, 7 Atl. 284.

<sup>18</sup> 3 Ohio St. 201.

and will ultimately prevail everywhere. In this, however, they were mistaken.<sup>19</sup>

#### THE RULE IN DELAWARE.

The only case to which the writer's attention has been directed is that of *Foster v. Pusey*.<sup>20</sup> The law given in that case was in a charge to the jury by *Comegys, C. J.*

The duties personal to the master are stated, in a general way, to be the same, practically, as those held to devolve upon him by the courts of New York as to furnishing safe places for the servant to work, safe instrumentalities to work with, and the employment and retention of competent servants. As to what duties are so personal to the master, as to repairs, there is no statement of them by the court. They state that a general manager or overseer or a superintendent of machinery represents directly the employer, whose neglect of duty is chargeable to the master. The relation of superior and subordinate servants, otherwise than as above expressed, is not stated by the court.

#### THE RULE IN MISSISSIPPI.

The English rule as stated in *Wilson v. Merry*, in the house of lords,<sup>21</sup> is applied in this state. The general statement of the rule that the master's duty is to provide reasonably safe premises and track, reasonably safe appliances and machinery, for the performance of the work by his servant, is recognized by all courts, but a distinction is made as to what shall constitute the exercise of ordi-

<sup>19</sup> *Chicago, etc., Ry. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 200; *Burlington & M. Ry. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921; *Sioux City, etc., Ry. Co. v. Smith*, 22 Neb. 775, 36 N. W. 285.

<sup>20</sup> 14 Atl. 545.

<sup>21</sup> L. R. 1 H. L. Sc. 326.

nary care in this respect on the part of the master; and in this state it is held that the company or master is bound, in the original construction of a railroad and its appurtenances, to make it reasonably secure for the safe transportation of trains upon it, and also to keep the track in repair. In order to discharge the latter duty, the corporation must employ suitable persons, and supply them with needful material, to make repairs, and should also, through its agent or agents, have supervision over the road. In order to hold the company responsible to an employé—as, a conductor on its train—for injuries sustained because the road or its appurtenances are out of repair, it must be shown that the company is in default in its duty, either in the selection of incompetent servants, or because it employs an insufficient number to do the work, or in its failure to furnish proper material, or because the company had notice of the bad condition of the road, or was chargeable with negligence for not knowing.<sup>22</sup>

The court is noncommittal upon the application of the rule “*respondeat superior*.” They say: “Nor would we undertake to say, in advance, that there might not be officers clothed with such special authority, and filling such special relations to the company, as that the corporation should be esteemed as being present with them, commanding and acting, so that it may be made amenable to subordinate servants.”<sup>23</sup>

*The Mississippi Statute (Code 1892, § 3559).*

Every employé of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its em-

<sup>22</sup> N. O., J. & G. N. R. Co. v. Hughes, 49 Miss. 258; Howd v. Mississippi Cent. R. Co., 50 Miss. 178.

<sup>23</sup> N. O., J. & G. N. R. Co. v. Hughes, 49 Miss. 289.

ployés as are allowed by law to other persons, not employés, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge of an employé injured by the defective or unsafe character or condition of any machinery, ways, or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. Where death ensues from an injury to an employé, the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employé to waive the benefit of this section, shall be null and void; and this section shall not deprive an employé of a corporation, or his legal or personal representative, of any right or remedy that he now has by law.

#### THE RULE IN TENNESSEE.

The supreme court excepts from the class of fellow servants, for the negligent acts of one of whom, causing injury to another, the master is exempt from liability, those employés who are engaged at work in separate and distinct departments.<sup>24</sup>

<sup>24</sup> Nashville & C. R. Co. v. Carroll, 6 Heisk. 347; Knoxville Iron Co. v. Dobson, 7 Lea, 367.

The common-law rule is that a master is not liable to one servant for an injury caused by the want of care of a fellow servant. Nashville, C. & St. L. Ry. Co. v. Handman, 13 Lea, 423; East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea, 46; Nashville, C. & St. L. Ry. Co. v. Foster, 10 Lea, 351. This rule is not changed by Code, §§ 1166-1168. East Tennessee, V. & G. R. Co. v. Rush, 15 Lea, 145.

The mere fact that the offending servant is superior in grade does not take the case out of the rule, nor does the fact that the neg-

They also hold to the doctrine that a servant who is in a position of authority over the other servants, so as to

negligent servant is inferior in grade. *Nashville, C. & St. L. Ry. Co. v. Handman*, 13 Lea, 428; *Nashville & C. R. Co. v. Elliott*, 1 Cold. 611.

In order to charge the master, the superior must stand, as to the particular matter, in the place of the master, in performing a duty personal to the master. *Nashville, C. & St. L. Ry. Co. v. Handman*, 13 Lea, 428.

The mere fact that the servant was negligent does not affect the rule, unless he was negligent in the matter with which he was charged. *Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663; *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883.

A section boss is a vice principal as to the men working under him. *Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663.

The loading of a car with lumber with projecting ends is the act of servants, and a risk assumed by operatives upon the train. *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824.

A conductor or an engineer in charge of a train is the superior, not the fellow servant, of the fireman or other employes upon the train. *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883.

When not acting as conductor, the engineer is a fellow servant of the train hands other than the conductor. *Nashville, C. & St. L. Ry. Co. v. Wheless*, 10 Lea, 741.

A telegraph operator is the agent of the company, and is not a fellow servant of a conductor, when latter is injured.

An engineer is a fellow servant with a brakeman on the same train; the conductor being in charge thereof. *East Tennessee, V. & G. Ry. Co. v. Smith*, 89 Tenn. 114, 14 S. W. 1077.

Brakemen and car inspectors are fellow servants. *Nashville, C. & St. L. Ry. Co. v. Foster*, 10 Lea, 351.

The fact that a servant may not have known of the foreman's discharge, and that he continued to obey the foreman's orders as such, will not render the master liable for the foreman's negligence; but, to charge the master, the foreman must have been in fact a vice principal, acting in place of the master. *Allen v. Goodwin*, 92 Tenn. 385, 21 S. W. 760.

The master is only liable for the foreman's negligence in regard to

compel their obedience, is not, in the sense of the rule, a fellow servant in a common employment, but represents the master, who is, in general, liable for his negligence.<sup>25</sup>

The principle which underlies the decisions in this state is that the master's duty is the exercise of due care in the selection and retention of his servants; and when he has performed this duty, then there can rest upon him no liability for their negligence in the performance of their duties; and that this rule applies to the ordinary repairs of machinery and appliances.<sup>26</sup>

#### THE RULE IN FLORIDA.

The question of fellow servants was considered in a recent case, in reference to the doctrine of the common law. The trial court stated a rule, which was approved by the supreme court, in the following language: "A fellow servant is one engaged with another under a common master, and in the same common employment, so that they are brought in contact with each other, notwithstanding they are subject to the orders and under the exclusive control of separate bosses or foremen, and at different work in the same service. For illustration, if one were engaged as a common laborer to work on the roadbed or gravel train, he could not be a fellow servant with the engineer or conductor of a passenger train, but would be a fellow servant

some duty to the inferior which is imposed by law upon the master, and by him intrusted to the servant, and not for the personal negligence of such foreman. *Id.*

The doctrine that, where employes are in different departments of service, the fellow-servant rule does not apply, has no application in this state, except as to railroad companies. *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387.

<sup>25</sup> *Knoxville Iron Co. v. Dobson*, 7 Lea, 367.

<sup>26</sup> *Knoxville Iron Co. v. Dobson*, 7 Lea, 367.



with all employed on the roadbed or gravel train, if his employment was in a common work, and brought him in immediate contact with them and risk through them, although working under the orders of a different boss or foreman in the said common work, and in different sorts of work." <sup>27</sup>

This rule seems to recognize a distinction between those who are engaged upon the repair of ways and appliances and those operating or using them; else we find no reason for the exception stated, that a laborer working upon the track would not be a fellow servant with the engineer or conductor of a passenger train. It was evidently intended to classify such laborers as representing the master in the performance of his duties. The writer thought, at first, that the reason for the exception might be based upon the assumption that such laborer would not immediately come in contact with the offending servant in the performance of their respective duties; but, upon consideration, he is satisfied that such was not the intent of the court, for the further reason that the exception is stated without qualification, while as to other laborers in other departments it is qualified by contact or association with them.

The injury complained of in the case referred to was received prior to the enactment of chapter 3744, Laws 1887, and such law was not applied. This statute was repealed by the enactment of chapter 4071, Laws 1891, which reads as follows:

Section 1. A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary

<sup>27</sup> Parish v. Railway Co., 28 Fla. 251, 9 South. 696.

and reasonable care and diligence; the presumption in all cases being against the company.

Sec. 2. No person shall recover damage from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the company are both at fault, the former may recover; but the damages shall be increased or diminished by the jury in proportion to the amount of default attributable to him.

Sec. 3. If any person is injured by a railroad company by the running of locomotives or cars or other machinery of such company, he being at the time of such injury an employé of the company, and the damage was caused by the negligence of another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding.

#### THE RULE IN MONTANA.

The subject is regulated by statute:<sup>28</sup> "That in every case the liability of the corporation to a servant or employé acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such servant or employé were a passenger."

#### THE RULE IN SOUTH CAROLINA.

The duty of the master to provide in the first instance, and to keep in repair, his premises and appliances for use by his servants, is personal, and cannot be delegated to another, so as to relieve the master from the consequences of the manner in which the duty is performed.<sup>29</sup>

When the master delegates to any officer or agent the per-

<sup>28</sup> Comp. St. 1888, p. 817, § 607.

<sup>29</sup> Calvo v. Railroad Co., 23 S. C. 528; Couch v. Same, 22 S. C. 557; Coleman v. Same, 25 S. C. 446.

formance of duties which the master owes to his employés, such officer or agent, by whatever name he may be called, becomes the representative of the master. His acts are the acts of the master, and his negligence is the negligence of the master. This rule is applicable to a conductor, who is the representative of the company in charge of the train. The doctrine as expressed in the Ross Case is fully approved. It is held that the engineer and brakeman are fellow servants. They are both acting under orders of the conductor, and operating to bring about the same end.<sup>30</sup>

#### THE RULE IN ALABAMA.

The general doctrine approved in this state is quite clearly stated in *Smoot v. Railway Co.*:<sup>31</sup>

First. That for his own personal negligence, causing injury to an employé, the master must respond.

Second. Where his personal fault contributes directly to cause the injury, though concurring with it there may have been the negligence of a servant engaged in the common employment, he must also respond.

Third. He is not liable for injuries proceeding from other servants in the same employment.

Fourth. Injuries resulting from such cause are of the risks incident to the employment, which it is intended the servant contemplates and consents to incur when he enters the service. There is also another and higher reason, founded on the policy of encouraging and compelling the servant to exercise diligence and caution in the exercise of his duties, which, while protecting him, affords protection also to the master; such diligence being properly esteemed a better security against injury from the negligence of

<sup>30</sup> *Boatwright v. Railway Co.*, 25 S. C. 128.

<sup>31</sup> 67 Ala. 13.

a fellow servant than recourse against the master for damages, where the injury has been received.

Fifth. It is the duty of the master to use ordinary care—the care which men of common or ordinary prudence exercise under like circumstances for their own protection—in the employment of competent and skillful servants, and not to continue in his service such as are known to be wanting in either reasonable skill or diligence.

Sixth. The master must use ordinary care or diligence in furnishing fit and safe materials and appliances, and, when that is employed, machinery, for the service in which the servant is engaged. This, however, is not an absolute duty. The master must not be understood as insuring or warranting the safety or fitness of the materials or appliances furnished, more than he can be regarded as promising absolutely and unconditionally that the fellow servants are competent and diligent. When due care has been exercised in those respects, the duty to the servant is satisfied; for there is no obligation resting upon the master to be more careful of the safety of the servant than he is for his own security.

Seventh. Defects originally existing in such appliances, or which result from their use, are, like the negligence of fellow servants, of the incidental hazards of the service to which the servant must have contemplated he would be exposed.

Eighth. When such appliances have been furnished, when diligence has been observed in procuring them, the use of them is necessarily intrusted to the servants of a railroad company, as are their care and inspection and the repair of them, and determining when their use must be abandoned until repairs are made. This duty may be intrusted to those operating the appliances, or confided to other servants having no other duty but that of inspection or of repair.

However this may be, the several servants are in the same circle of employment, derive duty and compensation from the same source, and are laboring for a common purpose. They are fellow servants, and the master cannot be made liable to one for the negligence of the other. The machinist in the shop, whose duty it is to repair locomotives, and the supervisor of track, whose duty it is to keep the roadbed in proper and safe condition, have each been determined fellow servants of the fireman on the locomotive, for whose negligence the master could not be made liable.<sup>32</sup> If the coupling or bumper of the car, or the use of the car in its defective condition, was the result of the neglect or want of care of a fellow servant,—of the station agent, the conductor of the train, the fellow brakeman, or the car inspector,—the master is not liable.

Ninth. The burden of proving negligence rests upon the employé. Inference of it cannot be drawn from the fact of injury, and from the unfit and unsafe condition of the car. This is the established doctrine, distinguishing the case of injury to a servant and that of injury to a passenger.

Tenth. The master is not bound to supply the servant with the most approved and safest appliances. Such as are safe and fit, not exposing the servant to greater perils than are usually incident to the service, is the measure of duty.

It is not the relative grades of different officers or employés, or the subordination of the one to the other, which determines when they are fellow servants in relation to their common employer, but it is the nature of the duty intrusted to them. Those officers or agents who represent the master in the selection of other servants or employés, or in furnishing appliances in the first instance, while in

<sup>32</sup> *Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Same v. Smith*, 59 Ala. 245.

the performance of such duties are not fellow servants with those otherwise employed.

However, a foreman or assistant superintendent, or even a superintendent performing other duties, are to be considered fellow servants with other employes. It does not change the relation that such agents have power and authority to hire and discharge workmen, or direct or control them in the manner of performing their duties.<sup>33</sup>

*The Alabama Statute of 1886 (Code, §§ 2590-2592).*

Sec. 2590. When a personal injury is received by a servant or employé in the service or business of the master or employé, the master or employé is liable to answer in damages to such servant or employé as if he were a stranger, and not engaged in such service or employment, in the cases following:

First. When the injury is caused by reason of any defect in the ways, works, machinery, or plant connected with or used in the business of the master or employer.

Second. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

Third. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employé at the time of the injury was bound to conform, and did conform, if such injuries resulted from his having so conformed.

Fourth. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

Fifth. When such injury is caused by reason of the negligence of any person in the service or employment of the

<sup>33</sup> Mobile, etc., R. Co. v. Smith, 59 Ala. 245; Tyson v. Railroad Co., 61 Ala. 554.

master or employer, who has the charge or control of any signal points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself, engaged in the service or employment of the master or employer, unless he was aware that the master or employer or such superior already knew of such defect or negligence.

Nor is the master or employer liable under subdivision 1 unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

Sec. 2591. If such injury results in the death of the servant or employé, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distribution.

Sec. 2592. Damages recovered by the servant or employé of and from the master or employer are not subject to the payment of debts or any legal liabilities incurred by him.\*

\* A level car, or car propelled by hand, such as is in general use on railroads, is within the spirit and terms of Code, § 2590, subd. 5.<sup>24</sup>

The statute giving an action against the employer for injuries to the employé while engaged in the service<sup>25</sup> has no application to the known risks and dangers of the service, against which human skill and caution cannot provide, but renders him liable for injuries resulting from his own negligence, express or imputed, in the particular case stated; nor does it relieve the employé from the duty of using ordinary care for his own protection in the service.<sup>26</sup>

The court say in a recent case:<sup>27</sup> "The general principles regulat-

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<sup>24</sup> Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262.

<sup>25</sup> Code, § 2590.

<sup>26</sup> Mobile & O. R. Co. v. George, 94 Ala. 199, 10 South. 145.

<sup>27</sup> Mobile & O. R. Co. v. George, 94 Ala., on page 218, 10 South. 145.

**THE RULE IN GEORGIA.**

As applied to railroad companies, the common-law rule was wholly abolished in 1855 by an act of the legislature, which has been incorporated into their Code.

Section 2083 of the Code of 1882 provides as follows: "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employés who cannot possibly control those who should exercise care and

ing, in all the classes of cases defined by the statute, the rights and duties of the employé, and the liability of the employer, and also the defenses available to him, as declared by our former decisions, may be summarized as follows: Though the statute has no application to the known risks and dangers of the service or employment, against which human skill and caution cannot provide, when an employé sustains injury by reason of any defect in the ways, works, machinery, or plant, or the injury is caused by the negligence of any of the persons mentioned, and under the circumstances provided by the statute, it abrogates the common-law rule that the employé impliedly contracts to assume the known and ordinary risks incident to his employment. In neither of the classes of cases, however, does any liability for injuries caused by the known and ordinary risks arise without negligence on the part of the employer, or of some person intrusted with superintendence or authority to give orders or directions, or having charge or control of some signal point, locomotive, engine, car, or train upon the track of the railway, or by reason of the act or omission of some person done or made in obedience to the rules, regulations, or by-laws of the employer, or to particular instructions of a person delegated with authority in that behalf. The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence, or the negligence of a co-employé of the same or superior grade in the enumerated classes of cases. In all cases the employé is bound to use ordinary care for his own protection. If there are two ways of discharging the service apparent to the employé, one dangerous, and the other safe or less dangerous, he must select the safe or less dangerous way. \* \* \* To enti-



diligence in the running of trains, such companies should be liable to such employes, as to passengers, for injuries arising from the want of such care and diligence."

As to other corporations and natural persons, the common law was specially enacted and adopted. Section 2202 of the Code of 1882 provides as follows: "The principal is not liable to an agent for injuries arising from the negligence or misconduct of other agents about the same business. The exception in case of railroads has been stated."

the plaintiff to recover by virtue of the statute, he must both aver and prove a case coming within one of the enumerated classes of cases." Where the charge is negligence in giving directions or orders, "it is incumbent on plaintiff to show: (1) That the person who gave the orders or directions was in the service or employment of defendant; (2) that he was bound to conform to the orders of such person; (3) that he did conform to such orders, and that his injuries resulted from having so conformed; and (4) that the person was negligent in giving the orders or directions."

In an action under section 2590, Code, if the complaint alleges that the injuries were caused by a defect in the machinery used, it must also allege that such defect arose from the negligence of the employer, or some person in the service intrusted by him with the duty of seeing that the machinery was in a safe and proper condition, or had not been discovered or remedied on account of negligence on the part of one or the other of them; and an averment that they knew of the defect, or might have known by the exercise of reasonable diligence, without more, is not sufficient."

If it is alleged that plaintiff's injuries were caused by the negligence of the foreman who had superintendence and control of the engine, machinery, etc., and who knowingly allowed the machinery or appliance to be and remain in a defective condition, this will be sufficient, under the second subdivision of the statute."

The fact that a foreman was voluntarily performing the manual labor of an ordinary switchman when placing a car dangerously near a track does not constitute him a fellow servant."

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<sup>22</sup> Seaboard Manuf'g Co. v. Woodson, 94 Ala. 143, 10 South. 87.

<sup>23</sup> Seaboard Manuf'g Co. v. Woodson, 94 Ala. 143, 10 South. 87.

<sup>24</sup> Kansas City, M. & B. R. Co. v. Burton (Ala.) 12 South. 88.

As to employés, a doctrine of contributory negligence was specially enacted, more restrictive than the common-law rule. Section 3036 of the Code of 1882 provides as follows: "If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company should be no bar to the recovery."

Under these several provisions of the Code is worked out the doctrine of the master's liability for injury to his servant. So far as employés of railroads are concerned, they can recover of the common master for injuries sustained by the negligence of a co-employé; the only restriction upon such right being that the servant, in all cases, must be free from fault.<sup>41</sup>

As to other enterprises or branches of business, the master is not liable to the servant for injuries caused by the neglect of a fellow servant.<sup>42</sup>

As to who are fellow servants, the court say:<sup>43</sup> "If any doubt existed formerly as to who were fellow servants, the decision in *Hough v. Railway Co.*<sup>44</sup> resolves the doubt."

The doctrine of superior and subordinate is generally applied.<sup>45</sup> It is thus stated in *Augusta Factory v. Barnes*: "Where the plaintiff used all care and diligence to avoid the injury occasioned by the negligence of the principals and other servants, with whom he was disconnected at the time, and where he was acting in obedience to the orders of an-

<sup>41</sup> *Baker v. Railroad Co.*, 68 Ga. 699; *Western & A. R. Co. v. Adams*, 55 Ga. 279.

<sup>42</sup> *Keith v. Coal Co.*, 81 Ga. 49, 7 S. E. 166; *McGovern v. Manufacturing Co.*, 80 Ga. 227, 5 S. E. 492.

<sup>43</sup> *Krogg v. Railroad Co.*, 77 Ga. 214.

<sup>44</sup> 100 U. S. 214.

<sup>45</sup> *Augusta Factory v. Barnes*, 72 Ga. 227; *Central R. R. v. De Bray*, 71 Ga. 406; *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137.

other servant over him, whose orders he was bound to obey, the injured servant may recover."

In *McGovern v. Manufacturing Co.*<sup>46</sup> this doctrine was not applied. The distinction is not made apparent in the opinion of the court, nor the ground upon which the question was decided. It may be that the foreman was considered a fellow servant, or it may be that there was some fault on the part of the injured plaintiff which prevented his recovery notwithstanding the neglect of his superior, or that when injured he was not acting in obedience to the command of such superior, but was injured by the negligent act of the superior in performing the work of a servant.

In *McDonald v. Eagle & Phenix Manuf'g Co.*<sup>47</sup> a distinction is made between a mere foreman of a job and one having more extended authority or control, and it is distinctly held that a mere foreman of a job is a fellow servant; that, to give a foreman the character of a vice principal, he must have general superintendence.

It was early held, under the provisions of the Code, that though the company or its agents may be guilty of negligence, yet if the injured party could, by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company; and if it appears that both parties are guilty of negligence, and the person injured could not, by ordinary care and diligence, have avoided the consequence to himself of the negligence of the defendant or its agents, the plaintiff may recover, but the jury should lessen damages in proportion to the negligence and want of ordinary care of the injured party.<sup>48</sup>

<sup>46</sup> 80 Ga. 229, 5 S. E. 492.

<sup>47</sup> 68 Ga. 844.

<sup>48</sup> *Macon, etc., Railroad Co. v. Johnson*, 38 Ga. 409; *Atlanta, etc., Ry. Co. v. Ayers*, 53 Ga. 12.

However, in the later case of *East Tennessee, V. & G. R. R. v. Maloy*<sup>49</sup> this doctrine, so far as it relates to railroad employés, is disapproved. The court say: "The doctrine of contributory negligence does not apply in the case of an injury sustained by an employé. He must be free from fault, and, if the injury is sustained by him in consequence of any fault or negligence on his part, he cannot recover." In the same case the court say, as to the effect of presumptions: "Where it is shown that the company itself is at fault, then the presumption is that the employé was not at fault; or when it is shown that the employé was free from fault, then the presumption would arise that the company was at fault, and the onus would be upon it to remove the presumption by showing proper diligence."

It is also held in this state that the Code relates to all servants in the employ of a railroad company, and is not restricted, as in Iowa and Minnesota, to those who are engaged in operating trains.<sup>50</sup>

The duty of the master is thus stated: "To properly select and superintend its operatives, its machinery, appliances, and appointments of every sort used in its business. It is a guarantor that all reasonable and proper care has been and shall be exercised in the performance of these duties, and its liability should be limited to a failure to meet its obligations in this respect."<sup>51</sup>

#### THE RULE IN OREGON.

The doctrine in this state is that any duty the master owes for the protection of his servant cannot be delegated

<sup>49</sup> 77 Ga. 237, 2 S. E. 941.

<sup>50</sup> *Georgia Railroad & Banking Co. v. Miller*, 90 Ga. 571, 16 S. E. 939.

<sup>51</sup> *Atlanta, etc., Ry. v. Ray*, 70 Ga. 678.

to any servant of any grade, so as to exempt the master from liability for its negligent performance, causing injury to other servants; that, among such duties, he is to construct and maintain in repair the ways and appliances to be used by the servants; that persons so charged with the master's duty are in no sense fellow servants of those who use and operate such ways or appliances.<sup>52</sup>

It was held that a switchman, whose duty it was to operate a switch, is not engaged in the construction or repair of ways and appliances, but, rather, that his duties pertain to the operation of such, and thus he becomes a fellow servant of train operatives.<sup>53</sup> This is in accord with the great weight of authority upon this question.<sup>54</sup>

The position of the courts of this state as to the effect of an injury occasioned to a subordinate by the neglect of a superior servant is not fully disclosed by any authority at hand. The question is referred to in *Knahtla v. Railway Co.*,<sup>55</sup> but not discussed. The complaining servant there was held not to be within the doctrine, as he was not working under the control of the conductor or engineer at the time of receiving his injury. In *Fisher v. Railway Co.*<sup>56</sup> it was held that the section foreman, whose business it was to inspect the track, and keep proper watch and oversight

<sup>52</sup> *Miller v. Southern Pac. Co.*, 20 Or. 285, 26 Pac. 70; *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497.

<sup>53</sup> *Miller v. Southern Pac. Co.*, 20 Or. 285, 26 Pac. 70; *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497.

<sup>54</sup> *Roberts v. Railway Co.*, 33 Minn. 218, 22 N. W. 389; *Brown v. Railway Co.*, 68 Cal. 174, 7 Pac. 447, and 8 Pac. 828; *Harvey v. Railroad Co.*, 88 N. Y. 484; *Naylor v. Railroad Co.*, 33 Fed. 801; *Randall v. Railroad Co.*, 109 U. S. 483, 3 Sup. Ct. 322; *Slattery v. Railroad Co.*, 23 Ind. 83; *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 322; *Walker v. Railway Co.*, 128 Mass. 10.

<sup>55</sup> 21 Or. 136, 27 Pac. 91.

<sup>56</sup> 22 Or. 533, 30 Pac. 429.

over it, was in the exercise of duties personal to the master, and his neglect in not informing those in charge of a train of a defect caused by a snow slide was chargeable to the master. This did not involve the question under consideration, as he had no control over such operatives.

#### THE RULE IN NORTH DAKOTA.

The New York rule, in some of its principal features, is adopted in this state. The negligent performance of, or omission to perform, a duty which the master owes to his employés, is the negligence of the master, by whatever other agent or servant it is omitted or thus performed. The rank or grade of the servant, or the fact that one is subordinate to and under the control of the other, does not change the rule. The character of the act, not the rank or position of the offending servant, determines the question. If the act is one that the master must perform, and it causes injury to an employé, then the master must respond. If, on the other hand, the act is that of a servant, though he be in authority to direct and command, then it is the act of a fellow servant.<sup>57</sup>

The duty of the master to furnish in the first instance reasonably safe premises and appliances for the use of his servants, or exercise due care to that end, is one which is direct and positive upon the master, and cannot be delegated so as to relieve him from responsibility.<sup>58</sup> What was said in *Elliot v. Chicago, M. & St. P. Ry. Co.*<sup>59</sup> as to superior and subordinate servants, as well as to servants being brought in contact with each other, in so far as it creates an inference that the relation and the association aforesaid

<sup>57</sup> *Ell v. Northern Pac. R. Co.*, 1 N. D. 336, 48 N. W. 222

<sup>58</sup> *Ell v. Northern Pac. R. Co.*, 1 N. D. 336, 48 N. W. 222.

<sup>59</sup> 5 Dak. 523, 41 N. W. 758.

are such conditions as affect the determination of the question of fellow servants, must be considered as disapproved or controlled by the very emphatic language used in *Ell v. Northern Pac. R. Co.*<sup>60</sup>

### THE RULE IN WASHINGTON.

The general doctrine is very ably discussed in *Sayward v. Carlson*.<sup>61</sup> The court gives its adherence to the doctrine that, to exempt the master, and make the two servants fellow servants, they must be engaged in the same common employment, in the same department of service, and act under the same immediate direction. The court says: "The principal difficulty lies in determining what 'common employments' are;" that it finds in *Crispin v. Babbitt*<sup>62</sup> what seems to be the most correct brief statement of some of the points to be regarded in cases of this kind, and quote therefrom the following: "The liability of the master does not depend upon the grade or rank of the employé whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. On the same principle, however low the grade or rank of the employé, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master which is confided to such inferior employé."

These are flexible rules, in which the doctrine that the delegated powers and duties of the master make a servant, at times, the very master himself, as to other servants, is the

<sup>60</sup> 1 N. D. 336, 48 N. W. 222.

<sup>61</sup> 1 Wash. St. 29, 23 Pac. 830.

<sup>62</sup> 81 N. Y. 516.

central feature; and they seem to us eminently just to both master and servant.

The court, therefore, so applied the rule that where one's usual duties were such as pertained to those of the master himself, yet at the time of his negligent act, causing injury to an employé, he was not performing such duties, but those which related to the duty of a servant, he was a fellow servant of the one who had sustained such injury.

The same court held <sup>68</sup> that a yard boss, who had entire control of a millyard, hired and discharged workmen, and superintended the piling of lumber, was not a fellow servant of such workmen, but represented the master, where one of such workmen was injured by the negligent manner in which lumber was piled under his direction.

\* *Zintek v. Stimson Mill Co.*, 7 Wash. 178, 32 Pac. 997, and 33 Pac. 1055.



## CHAPTER XIX.

### CONTRIBUTORY NEGLIGENCE.

**Impossible to formulate a definition that will include all elements of the doctrine, or to declare an exact rule that will meet every emergency, p. 394.**

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### GENERAL PRINCIPLES.\*

**This branch of the subject of negligence is not free from difficulties and perplexities, not alone to the student, but to the experienced practitioner as well. Text writers have**

\* See note, p. 449.

in vain sought to relieve the subject of much of its apparent perplexity by a method of classification. They have been unable to reconcile conflicting decisions, or establish or induce any substantial uniformity in the application of principles. The difficulties that beset us, to a great extent, are the result of an attempt on the part of courts to formulate a definition which would clearly include all of the elements of the doctrine, and declare exact rules that would meet every emergency. Such attempts, from the very nature of the subject, must be fruitless. The fact that the determination of the question of the existence of negligence, contributing to the injury, is so generally and peculiarly the province of a jury, is sufficient to demonstrate the fact that practical rules of universal application cannot be formulated. Various definitions of this very comprehensive term have been stated by text writers and by courts.

Wharton<sup>1</sup> states it thus: "A person who by his own negligence (such is the general rule) causes damage to himself cannot recover compensation from another person on the ground that, if it had not been for the negligence of the latter, damages would not have occurred."

Judge Cooley, in his work on Torts, states it thus: "If the party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault; and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof."

It is stated in the American and English Encyclopedia of Law<sup>2</sup> that "contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that

<sup>1</sup> Section 130.

<sup>2</sup> Volume 4, p. 17.

negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."

By Shearman and Redfield, in their work on Negligence,<sup>3</sup> it is stated thus: "One who is injured by the mere negligence of another cannot recover, at law or in equity, any compensation for his injury, if he, by his own or his agent's ordinary negligence or willful wrong, proximately contributed to produce the injury of which he complains, so that but for his concurring and coöperating fault the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him."

In *Tuff v. Warman*<sup>4</sup> it is stated: "Mere negligence or want of ordinary care or caution will not disentitle the plaintiff to recover, unless it be such that but for that negligence or want of ordinary care or caution the misfortune could not have happened." This statement forms a head-note of the report of that case. It enunciates a rule that has been followed in many states. It is, however, criticised and disapproved by the supreme court of Massachusetts in *Murphy v. Deane*.<sup>5</sup> The first ground of criticism is one that applies to the burden of proof; the rule there being, as well as in Michigan and some other states, that the plaintiff, in the first instance, must establish either that he himself was in the exercise of due care, or that the injury was in no way attributable to any want of proper care on his part. They say:

"We think, however, that the statement will be found to be faulty in substance, as well as in form. If it should ap-

<sup>3</sup> Section 25.

<sup>4</sup> 5 C. B. (N. S.) 573-586.

<sup>5</sup> 101 Mass. 455.

pear that the negligence of the defendant was an adequate cause to produce the result, the plaintiff must recover, even though he himself, equally with, or even to a greater degree than, the defendant, was in fault. If the case can be supposed in which both parties were equally in fault, the fault of each being equally proximate, direct, and adequate to produce the result, so that it might have occurred from the conduct of either without the fault of the other, there would then be a case of contributory negligence, for the consequences of which neither could recover from the other; but, upon the statement quoted from *Tuff v. Warman*, neither would be disentitled, and therefore both could recover, if both suffered injury, each from the other. Every case in which the proof fails to show, or leaves it in doubt, which of two sufficient causes was the actual proximate cause of the injury, is practically such a case. It is manifest from this illustration that, as a definition of the limits of the right to recover in such cases, the proposition referred to must be logically incorrect. Eliminating negatives from the first branch of the proposition, it is that a plaintiff may recover in such cases, unless the misfortune could not have happened but for his own negligence. This, as we have seen, being stated affirmatively, is too broad, and not correct, although its supplement or negative counterpart is correct as far as it extends, to wit, that he cannot recover if the misfortune could not have happened but for his own negligence."

In case of contemporaneous negligence which relates directly to the injury, they state the rule to be that "the plaintiff cannot recover if by due care on his part he might have avoided the consequences of the carelessness of the defendant,"—citing various cases;<sup>6</sup> and in ordinary cases of

<sup>6</sup> *Lucas v. New Bedford & T. R. R.*, 6 Gray, 64; *Waite v. Northeastern R. Co.*, El., Bl. & El. 719; *Robinson v. Cone*, 22 Vt. 213.

negligence: "Whenever there is negligence on the part of the plaintiff contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery."

Many of the courts have, in stating the rule, omitted the qualifying clause, "that but for such negligence on the part of the plaintiff the misfortune could not have happened," while many others so adopt and use it.

In New York the rule is stated thus: "To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was caused solely by the negligence of the defendant; that the plaintiff did not, by any act of his, contribute to such injury."<sup>7</sup>

In California: "If the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover."<sup>8</sup>

In Wisconsin: "That a relation must have existed between the act of the plaintiff and the accident or injury, and that relation must have been such as to have caused, or helped to cause, the injury or accident."<sup>9</sup>

In Maine: "That if the party, by a want of ordinary care, contributed to produce the injury, he will not be entitled to recover."<sup>10</sup>

In Indiana: "It must be a case of unmixed negligence. In such a case a party cannot recover if it appear that, by the want of ordinary care and prudence on his part, he con-

<sup>7</sup> Johnson v. Hudson R. R. Co., 20 N. Y. 71.

<sup>8</sup> Strong v. Railroad Co., 61 Cal. 328; Robinson v. Railroad Co., 48 Cal. 423.

<sup>9</sup> Sutton v. Town of Wauwatosa, 29 Wis. 21.

<sup>10</sup> Kennard v. Burton, 25 Me. 39.

tributed to the injury, or if, by the exercise of ordinary care, he might have prevented the injury.”<sup>11</sup>

In the note to *Freer v. Cameron*<sup>12</sup> it is stated: “To defeat the right of action, it must appear that but for the negligence of the party injured, operating as an efficient cause of the injury, in connection with the negligence or misconduct of the defendant, the injury would not have happened.” Many cases are cited as sustaining this proposition, but it is very evident it can have no application in those states where the burden is upon the plaintiff to show he was in the exercise of due care, or that the injury is in no way attributable to any want of care on his part.

In the United States supreme court, in a recent case,<sup>13</sup> the court say: “Without going into a discussion of these definitions, or even attempting to collate them, it will be sufficient for present purposes to say that the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: Although the defendant’s negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years: that the contributing negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party’s negligence.”

In Virginia the rule is stated to be “that one who is in-

<sup>11</sup> *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 291.

<sup>12</sup> 4 Rich. Law, 228.

<sup>13</sup> *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 429, 12 Sup. Ct. 679.

jured by the mere negligence of another cannot recover any compensation for his injury if he, by his own ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that but for his concurring and coöperating fault the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence."<sup>14</sup>

In the case of *Richmond & D. R. Co. v. Yeamans* the trial court charged that even though the plaintiff contributed to the injury, yet his right of recovery is not thereby affected, unless they also find he was in fault in so doing. The supreme court emphatically repudiate such doctrine, and say: "If the plaintiff does an act or has a misfortune, not caused or induced by the defendant, which is the proximate cause of the injury, that act or misfortune is his own, and the jury have no right to consider the intent, or do more than determine the fact of his contributor, negligence." They also condemn the use of the phrase "materially contributing," or similar qualifying words, by courts, as not only being improper, but error.

The rule as stated in North Carolina in recent cases, and which has been similarly expressed by the courts of some other of the southern states, is peculiarly exceptional to the general rule, as it practically destroys the defense of contributory negligence. The rule is well settled that contributory negligence is based upon negligence of the other party; that without such negligence the doctrine cannot apply, or, still more strongly, cannot exist. Yet we find

<sup>14</sup> *Dun v. Railway Co.*, 78 Va. 645; *Rudd's Adm'r v. Railway Co.*, 80 Va. 549; *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860, 12 S. E. 946.

the supreme court of that state enunciating the following rule: "Notwithstanding any real or supposed negligence of an injured plaintiff, a railway company is liable in damages if but for its own want of care the injury could have been avoided."<sup>15</sup>

This rule, when stated more definitely, might apply, as we have seen, to cases where there was negligence of the defendant which was subsequent to the contributory negligence of the plaintiff; but in the case stated it was said to be applicable to a case where the defendant's negligence was antecedent. Such negligence consisted in furnishing defective appliances, and the contributory negligence of the plaintiff was connected with the use of them.

It is evidently the policy of some of the states, especially those of the south, in a measure, at least, to restrict the application of the doctrine of contributory negligence.

In Mississippi a constitutional convention reported (and the report was adopted) a provision (being section 3559, Code 1892) "that knowledge by an employé, injured by the defective or unsafe character or condition of machinery, ways, or appliances, shall be no defense to an action for injuries caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them."

In Georgia this subject is controlled largely by statute; yet their courts hold that the statute is but an enactment of the law as previously construed by the courts.<sup>16</sup> The law in Georgia still is that contributory negligence on the part of a plaintiff who is an employé will defeat his recovery of damages from his master for injuries received through the

<sup>15</sup> Deans v. Railroad Co., 107 N. C. 686, 12 S. E. 77; Clark v. Railroad Co., 109 N. C. 430, 14 S. E. 43; Mason v. Richmond & D. R. Co., 111 N. C. 482, 16 S. E. 698.

<sup>16</sup> Central R. Co. v. Brinson, 70 Ga. 207.



alleged negligence of the master or his agents; that any fault on the part of the servant will constitute such contributory negligence as will defeat a recovery. In fact, there is but little, if any, difference in the application of the doctrine in this state under the statute from its general application under the general rule, so far as the doctrine has relation to master and servant, except the degree of fault on the part of the servant. In such cases the doctrine of comparative negligence is not applied.<sup>17</sup>

In Tennessee the general rule as applied is somewhat peculiar, owing to the provisions of their statute. The statute has no application to employes of railroads or to railway passengers; only to such of the general public as suffer injury from collision on the roadway proper.<sup>18</sup> The doctrine, so far as it relates to master and servant, is not substantially different from the general rule.<sup>19</sup>

In Kentucky the general rule prevails.<sup>20</sup> The Kentucky statute making a defendant liable for injuries caused by gross neglect, notwithstanding the contributory negligence of the person injured, applies only where death results from such gross neglect.<sup>21</sup>

### COMPARATIVE NEGLIGENCE.

The doctrine of comparative negligence, as applied by the courts of Illinois, where it is presumed to prevail, is perhaps as little understood by the profession generally, and especially by the profession outside of that state, as any branch of the law of negligence. In other words, speak-

<sup>17</sup> *Georgia R. Co. v. Ivey*, 73 Ga. 499.

<sup>18</sup> *East Tennessee, V. & G. R. Co. v. Rush*, 15 Lea, 145.

<sup>19</sup> *East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea, 36.

<sup>20</sup> *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160.

<sup>21</sup> *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665.

ing generally, there is a misconception of the question; the general understanding being largely that the negligence of the parties is compared, and the damages are apportioned according to the fault of each, and that he whose negligence is greatest is liable to the other for injuries sustained, but the amount of compensation which the one of lesser fault may recover is diminished in proportion to his fault when compared with the fault of the other; that the plaintiff might recover, even if not himself in the exercise of ordinary care. A most concise definition of the term "comparative negligence," as it is now recognized by the courts of Illinois, in view of late decisions of the supreme court of that state, is by the learned author of the chapter on that subject in the American and English Encyclopedia of Law.<sup>22</sup> He says: "Comparative negligence is that doctrine in the law of negligence by which the negligence of the parties is compared in the degree of slight, ordinary, and gross negligence, and a recovery permitted, notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury, or when the negligence of the defendant is not gross, but *only ordinary or slight, when compared, under the circumstances of the case, with the contributory negligence of the plaintiff.*" The concluding part, marked in italics, I am not sanguine is strictly accurate as a statement of the rule when applied to servants, as the master's duty is that of ordinary care, and he may be guilty of slight negligence, and still be in the exercise of ordinary care. In not at first recognizing this distinction—that slight negligence and slight want of ordinary care are not equivalent terms

<sup>22</sup> Volume 3, p. 367.

—is evidently found the cause of much of the apparent confusion in the decisions of the courts of Illinois.

The principal difficulty arose from the language of the court in the *Jacobs Case*.<sup>23</sup> After reviewing the leading cases in England and in several of the states upon the question of contributory negligence, the court say: "It will be seen, from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff,—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it very perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*<sup>24</sup> and *Lynch v. Nurdan*.<sup>25</sup> We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."

From this language the impression was formed that if the plaintiff's negligence was slight, in comparison with the negligence of the defendant, he was entitled to recover, even

<sup>23</sup> 20 Ill. 488.

<sup>24</sup> 9 Car. & P. 613.

<sup>25</sup> 5 Jur. 797.

though his negligence was of such degree or extent as to show want of the exercise of ordinary care on his part. But such is not the case.

In *Chicago, B. & Q. R. Co. v. Lee*<sup>26</sup> the court say: "It never has been held that the plaintiff could recover simply because the defendant was guilty of greater negligence in that which produced the injury. The adjudged cases all declare the reasonable doctrine that if the plaintiff was alone guilty of negligence, or if the negligence of the parties was equal, there could be no recovery. Formerly it was the rule, if the negligence of the plaintiff contributed to the injury, however slight, it would bar an action. This rule has been modified by more recent decisions, and it is now the settled law that the plaintiff may recover, notwithstanding he may have been guilty of contributory negligence, if his negligence is slight, and that of the defendant is gross. It is an essential element to the right of action in all cases, that the plaintiff or party injured must himself exercise ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property."

Again, the same court say:<sup>27</sup> "The doctrine has been announced and often reiterated in this court that in order to authorize the plaintiff to recover on the ground of mere negligence, as distinguished from the willful tort of the defendant, it must appear that the party injured exercised ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property. Negligence is the omission to do something which a reasonable man, guided upon those ordinary considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man

<sup>26</sup> 68 Ill. 579.

<sup>27</sup> *Chicago, B. & Q. Ry. Co. v. Johnson*, 103 Ill. 520.

would not do. Or, according to the more terse definition of this court in *Great Western R. Co. v. Haworth*,<sup>28</sup> 'the opposite of care and prudence—the omission to use the means reasonably necessary to avoid injury to others.' When there is a particular intention to injure, or a degree of willful and wanton recklessness which authorizes the presumption of an intention to injure generally, the act ceases to be merely negligent, and becomes one of violence or fraud. In negligence there is no purpose to do a wrongful act, or to omit the performance of a duty. Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. In holding that the plaintiff may recover in an action for negligence, notwithstanding he has been guilty of contributory negligence, when his negligence is but slight, and that of the defendant gross, in comparison with each other, it must, of course, be understood that the terms 'slight negligence' and 'gross negligence' are used in their legal sense, as defined by common-law judges and text writers; for otherwise the terms would convey no idea of a definite legal rule. As thus defined, these terms express the extremes of negligence. Beyond gross and slight there are no degrees of negligence. It cannot, then, legally be true that where the plaintiff fails to exercise ordinary care, and the defendant is guilty of negligence only, the plaintiff's negligence is slight, and that of the defendant gross, in comparison with each other. Surely it needs no demonstration that if, as to a particular act, the negligence of the plaintiff was ordinary, and that of the defendant gross, their relation is not changed by comparing them with each other. The same evidence that determines the one to be gross, and the other ordinary, fixes their relative degrees with reference to each other."

<sup>28</sup> 30 Ill. 353.

In the later case of *Calumet Iron & Steel Co. v. Martin*,<sup>29</sup> the court, reviewing former decisions, after stating in emphatic terms that the rule has always been as stated in the foregoing case, says: "It inevitably follows, from the rulings in the numerous cases which have been referred to, that the court has not understood that the rule of comparative negligence changed or modified the general rule requiring that the injured party, in order to recover for the negligence causing his injury, must have observed due or ordinary care for his personal safety, and authorizing him to recover for such injuries, where he has observed such care."

The court persistently states that the plaintiff may recover, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight, etc. It as persistently maintains that an injured party cannot recover unless himself in the exercise of ordinary care. Such language is misleading. It expressly adopts the well-known and generally accepted definition of slight, ordinary, and gross negligence: Slight negligence is the want of great diligence; gross negligence is the want of slight diligence; ordinary negligence is the want of ordinary diligence. Negligence is the opposite of care and prudence; the omission to use the means reasonably necessary to avoid injury to others. Again, it is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent, reasonable man would not do. How can it be said that a person is guilty of contributive negligence when there is no negligence? There can be no negligence if such person is in the exercise of ordinary care, because ordinary care only is the measure of his duty. Any greater care would not be negligence. Therefore it cannot legally be said that he is

<sup>29</sup> 115 Ill. 358, 3 N. E. 461.

guilty of slight negligence, as slight negligence cannot exist as an element or degree of contributory negligence. It can be present only where the duty or the act is or may be such as to require the exercise of great or extraordinary care. The court, therefore, must use the term abstractly, and not with reference to circumstances and conditions.

The whole reasoning of the court would seem, after all, to result in the simple declaration that slight negligence is not, necessarily, a want of ordinary care, and, where it does not reach that degree, it is not sufficient to bar a recovery. The expression so used, and another, "Even though the plaintiff is guilty of only slight negligence, he cannot recover, unless defendant's negligence is gross, or the injury is wanton or willful," as used in *City of Winchester v. Case*,<sup>30</sup> are misleading in another particular. One who had not studiously examined the cases would, by the use of such language, understand that a person who was injured by the ordinary negligence of another could not recover, even though himself in the exercise of ordinary care; in other words, in order to authorize a recovery, the offending party must have been negligent in the degree, at least, of gross negligence. Yet such is not the case. This subject is fully explained and made clear in *Calumet Iron & Steel Co. v. Martin*,<sup>31</sup> where the court say: "Within the contemplation of that rule, where one has observed ordinary care, \* \* \* he has, even if slightly negligent, observed all the care the law requires of him; and where, having observed this care, he is injured by the negligence of another, that other has been guilty of the degree of negligence for which the law charges responsibility. The injured person could do no more to entitle himself to redress, and no higher degree of culpability is essential to the liability of the person causing the injury; and so the two degrees of negligence,

<sup>30</sup> 5 Ill. App. 486.

<sup>31</sup> 115 Ill. 358, 3 N. E. 456.

if the person observing ordinary care has been at all negligent, when compared with each other, fall within the opposite extremes of negligence, legally considered. \* \* \*

The necessary implication from the rulings in these cases [referring to previous cases cited] obviously is that where a party, while observing due or ordinary care for his personal safety, is injured by the negligent acts of another, there may be a recovery on account of such negligent acts; and in some of the cases this is expressly ruled. Thus, in *Illinois Cent. R. Co. v. Schultz*<sup>32</sup> the court said: 'Ordinary diligence only was required of the plaintiff to avoid the injury, and the liability of the defendant would then be fixed if it was guilty of negligence.' In *Illinois Cent. R. Co. v. Godfrey*<sup>33</sup> the court again said: 'Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it.'"

It is therefore very apparent that a master is responsible to one who receives injury by reason of his want of ordinary care, not merely for his want of great or extraordinary care, and that the use of the language referred to is merely to state the negligence of the parties by comparison, and to the effect that, where the injured party has exercised ordinary care, the party who has failed to exercise such a degree of care, thus causing such injury, is not only negligent, but his negligence is gross, though not gross within the well-accepted definition of that term.

The doctrine of comparative negligence—if there is any such doctrine—has no application to the relations of master and servant, in so far as changing or modifying the general rules of contributory negligence is concerned. The distinc-

<sup>32</sup> 64 Ill. 177.

<sup>33</sup> 71 Ill. 500.



tion is more in name than in substance; in fact, the supreme court of Illinois has so stated. In *Chicago & A. R. Co. v. Pondrom*<sup>34</sup> it is said: "The difference is more apparent than real;" and again, in *Toledo, W. & W. Ry. Co. v. McGinnis*:<sup>35</sup> "The rule is no doubt a modification of the language of the earlier decisions of this court, although not in fact a material modification of the common-law principle. Where courts state the rule differently, they hold, where the negligence of the plaintiff is slight, and that of the defendant gross, that plaintiff's negligence did not contribute materially to the injury."

It has frequently been said by the court that the doctrine of comparative negligence has no application except in those cases where the injured party was in the exercise of ordinary care,<sup>36</sup> which would seem to conflict with the statement above as to its relation to master and servant; but such is not the fact. The language used by the court is merely another way of expressing that, where the injured party was not in the exercise of ordinary care, he could not recover. If he was in the exercise of such care, and the offending party was not, he could recover; and it is immaterial whether he was guilty of slight negligence or entirely free from fault, or whether the defendant was guilty of gross negligence or only a want of ordinary care.

A mere preponderance of negligence upon the part of the defendant will not entitle the plaintiff to recover; and it never was so held in Illinois.<sup>37</sup>

<sup>34</sup> 51 Ill., at page 337.

<sup>35</sup> 71 Ill. 347.

<sup>36</sup> *Garfield Manuf'g Co. v. McLean*, 18 Ill. App. 447; *Abend v. Railway Co.*, 111 Ill. 203, 53 Am. Rep. 616; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510.

<sup>37</sup> *Chicago & N. W. R. Co. v. Dimick*, 96 Ill. 42; *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 568; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 358.

The court makes the exception that the defendant would be liable if the act causing injury was so willfully and wantonly reckless as to authorize the presumption of an intention to injure generally, notwithstanding he might have had no special intention to injure the plaintiff, even though the plaintiff failed to exercise ordinary care.<sup>38</sup> Yet this exception can hardly be said to be based upon the rules of negligence, but rather proceeds upon the ground of willful or intentional injury, which is the very opposite of negligence. Negligence is free from malice, willfulness, or intent.

<sup>38</sup> Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 525.

**CHAPTER XX.****CONTRIBUTORY NEGLIGENCE (Continued).**

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**ORDINARY CARE.\***

The essential feature of contributory negligence is absence of ordinary care. This term, "ordinary care," so important in all cases of negligence, has been defined and construed over and over again. The second chapter of this work is devoted to the proper meaning and application of this term. What is there said need not be here repeated. The terms, "ordinary care," "reasonable prudence," and similar ones, as

\* See note, p. 449.

applied to the conduct and affairs of men, have a relative significance, and cannot arbitrarily be defined. What may be reasonable care in one case may under different surroundings and circumstances be gross negligence. It may be convenient to repeat here a test lately approved by the supreme court of the United States:<sup>1</sup> "Whether the plaintiff, under all of the circumstances, exercised such due care and diligence as would be expected of a reasonably careful and prudent person under similar circumstances." This test is a little stronger than the prevailing rule, which is, "Such care and prudence as an ordinarily prudent person would exercise."

Any want of ordinary care, however slight, will preclude a recovery. Slight want of ordinary care should not be confounded with slight negligence. Slight negligence would mean an absence only of that extreme care which persons of great prudence and caution ordinarily use. An absence or want of such great or extraordinary care is entirely consistent with the exercise of such care and prudence as ordinarily prudent persons ordinarily exercise, and which is all the law requires.<sup>2</sup>

Language is used in some cases which seems at variance with the expression of this distinction; yet in most of them it will be found that no variance was intended, or any different rule stated.

The rule is thus tersely stated in Pennsylvania: "That any degree of negligence on the part of the plaintiff, contributing to the injury, destroys his right to recover. It is the kind of action, not the quantity, on the part of the plaintiff, which prevents the law from measuring between the

<sup>1</sup> Grand Trunk Ry. Co. v. Ives, 144 U. S. 429, 12 Sup. Ct. 679.

<sup>2</sup> Dreher v. Town of Fitchburg, 22 Wis. 678; Randall v. Telegraph Co., 54 Wis. 140, 11 N. W. 419.

plaintiff and the defendant their respective degrees of negligence, when the former comes into a court of justice.<sup>3</sup>

#### PROXIMATE CAUSE.\*

Want of ordinary care must contribute to the injury as a proximate cause. The fault, want of due care, or negligence, on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. To make good the defense upon this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff and the injury or accident of which he complains; and that relation must have been such as to have caused, or helped to cause, the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to follow or preclude another. It must have been some act, omission, or fault naturally and ordinarily calculated to produce the injury, or from which injury or accident might naturally and reasonably have been anticipated under the circumstances.<sup>4</sup> Thus it follows that there can be no contributory negligence where the injuries are purposely inflicted.<sup>5</sup>

Where an intention to commit an injury exists, whether the intention be actual or constructive only, the wrongful act ceases to be a mere negligent injury, and becomes one of violence or aggression.<sup>6</sup>

<sup>3</sup> *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. St. 449, 15 Atl. 865; *Monongahela City v. Fischer*, 111 Pa. St. 9, 2 Atl. 87; *Mattimore v. City of Erie*, 144 Pa. St. 14, 22 Atl. 817.

\* See note, p. 449.

<sup>4</sup> *Sutton v. Town of Wauwatosa*, 29 Wis. 21.

<sup>5</sup> *Carter v. Louisville, N. A. & C. Ry. Co.*, 98 Ind. 552.

<sup>6</sup> *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.

An assault and battery is not negligence. Negligence is an unintentional act or omission. It negatives an exercise of the will, and only exists when the will, as to the particular condition, is inactive.<sup>7</sup>

The words "willful negligence," used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligence or willful misconduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that the act was done thoughtlessly, heedlessly, and at the same time purposely and by design. It seems to be supposed that, by coupling the words together, the middle ground between negligence and willfulness, between cases of nonfeasance and misfeasance, will be arrived at.<sup>8</sup>

The mere fact that the plaintiff, at the time he suffered injury from the negligence of the defendant, was doing some unlawful act, will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury.<sup>9</sup>

Thus, the fact that plaintiff was driving his cattle to market on Sunday, in violation of the statute, when they were injured by the breaking down of a defective bridge which the defendant town was bound to maintain, would not

<sup>7</sup> Whart. Neg. § 302; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.

<sup>8</sup> *Louisville, etc., R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807.

<sup>9</sup> *Sutton v. Town of Wauwatosa*, 29 Wis. 21; *Woodman v. Hubbard*, 5 Fost. (N. H.) 67; *Mohney v. Cook*, 26 Pa. St. 342; *Norris v. Litchfield*, 35 N. H. 271; *Merritt v. Earle*, 29 N. Y. 115; *Bigelow v. Reed*, 51 Me. 325; *Hamilton v. Goding*, 55 Me. 428; *Kerwhaker v. Railway Co.*, 3 Ohio St. 172; *Baker v. Portland*, 58 Me. 199; *Philadelphia, N. & B. R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209; *Bird v. Holbrook*, 4 Bing. 628; *Barnes v. Ward*, 9 Man., G. & S. 420; *Knowlton v. Railway Co.*, 59 Wis. 278, 18 N. W. 17.

prevent a recovery upon due proof of defendant's negligence in constructing or maintaining the bridge.<sup>10</sup>

The fact that the defendant railway company had failed to block frogs in its yard, in disregard of the requirements of the statute in that respect, will not of itself entitle an employé, injured by reason of such neglect, to recover, if he knew, or was charged with knowledge, of such omission on the part of the company. Nor will the fact that a switch engine is being run at a rate of speed in excess of that allowed by law, where an employé is injured by such engine, who knew, and made no complaint, that such was the custom of working such engine.<sup>11</sup>

Though the plaintiff may have been a trespasser, and guilty of a positive wrong, yet that fact alone will not defeat his right of recovery for an injury occasioned by a breach of duty on the part of defendant or his agents, causing him injury. In order to have that effect, it must have contributed directly or proximately as a cause to the result. Thus, when a person gets upon a train, even with the intention of obtaining a ride without payment of fare, the agents in charge must use ordinary care and prudence in ejecting him, and have no right to eject him under circumstances which would endanger his personal safety. Although his entry upon the car was a trespass, his entry, being an accomplished fact, would not directly conduce to the injury which he sustained.<sup>12</sup>

The mere matter of time when an injury takes place is not an element which does or can enter into the consideration of the cause of it. Time and place are circumstances necessary in order that any event may happen or transpire; but

<sup>10</sup> Sutton v. Town of Wauwatosa, 29 Wis. 21.

<sup>11</sup> Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079.

<sup>12</sup> Needham v. Railway Co., 37 Cal. 409; Meeks v. Railway Co., 56 Cal. 521.

they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. There may be concurrence or connection of time and place between two, three, or more events, and yet one event may not have the remotest influence in causing or producing either of the others.<sup>13</sup>

Again, it was held in a most elaborate opinion, where the authorities were reviewed, that the maxim "*causa non remota spectatur*" is not controlled by time or distance, nor by the succession of events.<sup>14</sup>

In *Trow v. Vermont Cent. R. Co.*<sup>15</sup> the court defines the term "proximate cause," to mean "negligence occurring at the time the injury happened." This definition is too general to be of practical use, and certainly is not comprehensive enough to include all cases. The fact is that the cause of an accident or injury may antedate, and often does, the accident or injury. The negligent act or omission, but for which the event causing injury would not have occurred, may also antedate the immediate cause. Such being the fact, the definition of "proximate cause" as being the "immediate cause" is not strictly accurate without some qualification as to the application of the word "immediate." Many definitions are attempted by courts and text writers, but none, so far as the writer's research goes, have given a definition that is sufficiently comprehensive and exact as to be of universal, or even general, application. The definition of "cause" as stated by Appleton, C. J., in *Moulton v. Sanford*,<sup>16</sup> is as comprehensive and definite as any. He there says: "The cause of an event is the sum total of the contingencies of every description, which being realized, the event in-

<sup>13</sup> *Sutton v. Town of Wauwatosa*, 29 Wis. 21.

<sup>14</sup> *Kellogg v. Railway Co.*, 26 Wis. 223; *Insurance Co. v. Boon*, 95 U. S. 130.

<sup>15</sup> 24 Vt. 492.

<sup>16</sup> 51 Me. 134.



variably follows. It is rarely, if ever, that the invariable sequence of events subsist between one antecedent and one consequent. Ordinarily, that condition is usually termed 'the cause' whose share in the matter is the most conspicuous, and is the most immediately preceding and proximate to the event." This definition has been severely criticised; yet, being qualified as to its general applications, it may not be inaccurate. The terms "proximate cause" and "reasonable doubt" have become ingrafted into our jurisprudence as expressions which the profession comprehend; yet there is no one equal to the task of formulating a clear and accurate definition, or supplying their place with equivalent expressions. They are self-defined. The discussion by text writers of the question of proximate and remote cause as an abstract proposition has been unprofitable. It may sometimes be—in fact, it often is—very difficult to determine whether an act or omission is the proximate cause of a result; whether such act had effect as a producing cause, or as one of several acts, which, combined, produced the result; and, under the circumstances, the determination of the question can receive but little aid from elaborate definitions of the term.

The attendant circumstances and situation of the parties play so important a part that definitions are useless, and only the principle of the relation of cause to effect can be of avail. It is perhaps well to call attention to the fact that proximate cause does not mean the direct cause in point of time, but may mean the nearest by relation; that remote cause does not mean remote in point of time, but merely in its connection with the primary cause,—and make this as emphatic and clear as possible, and draw the distinction equally as clearly between direct or immediate causes of injury and negligent acts that lead up to and produce it, or, in other words, that are the occasion of it.

To illustrate: A farmer along the line of a railroad may open the fence maintained by the company for temporary purposes, and, while so left open, his cattle may stray upon the company's track, and receive injury by coming in contact with the company's trains without any fault being chargeable to its servants in charge. The direct cause of such injury would be the collision. The remote cause in point of time would be the act of the farmer in leaving the fence open. The remote cause in point of time becomes the proximate cause in producing the injury. We go back of the direct cause to find a negligent act which made the collision and injury probable, without which the accident and injury would not have occurred, and we charge such an act with the responsibility for the injury.

Again: If the cattle broke through the fence by reason of its defective and insufficient condition, and strayed upon the track as before, with the same result, the direct cause of the injury would be the same,—the collision; yet we go back to find a negligent act that primarily made the collision and injury probable, which would be the insufficiency of the fence, and charge the consequences to that act. Lord Bacon's maxim is: "Also, you may not confound the act with the execution, only, of the act, and so the cause of the act with the execution of the act, and by that means make the immediate cause the remote cause."

Attention should be called to the rule that any negligent act or omission of the plaintiff, amounting to a want of ordinary care under the circumstances, which contributed to the injury,—that is, aided in causing it, or helped to cause it, or without which the injury would have been avoided, whether such act preceded, succeeded, or was contemporaneous with the negligent act of the defendant,—may constitute contributory negligence.

**SAME—INTERVENING CAUSES.\***

"The true rule of what is the proximate cause of an injury," say the court in *Milwaukee & St. P. Ry. Co. v. Kellogg*,<sup>17</sup> "is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments; as, an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-repeated case of the squib thrown in the market place.<sup>18</sup> The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new or independent cause intervening between the wrong and injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence or an act amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such case the resort of the sufferer must be to the originator of

\* See note, p. 449.

<sup>17</sup> 94 U. S. 474.

<sup>18</sup> *Scott v. Shepherd*, 2 W. Bl. 802.

the intermediate cause. But when there is no intermediate effect, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered according to the common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and an effect, though it may be so imperceptible as to be overlooked by a common mind. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events of fact, and ascertain whether they are naturally and probably connected with each other by a continuous sequence; and this must be determined in view of the circumstances existing at the time."

In *Baltimore & P. R. Co. v. Reaney*,<sup>19</sup> Avery, J., says: "In the application of the maxim, '*in jure non remota causa sed proxima spectatur*,' there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned. It is certainly true, that where two or more independent causes concur in producing an effect, and it can-

<sup>19</sup> 42 Md. 117.

not be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes; in such case, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. But it is equally true, that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up, as a defense, that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done,"—citing *Davis v. Garrett*.<sup>20</sup>

"If the damage has resulted directly from concurrent wrongful acts or neglect of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury."<sup>21</sup>

<sup>20</sup> 6 Bing. 716.

<sup>21</sup> Cooley, *Torts*, § 78; *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Car. & P. 190; *McCahill v. Klipp*, 2 E. D. Smith, 413; *Chapman v. Railway Co.*, 19 N. Y. 341; *Colegrove v. Railway Co.*, 20 N. Y. 492; *Barrett v. Railway Co.*, 45 N. Y. 628; *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62); *Powell v. Deveney*, 3 Cush. 300; *Lane v. Atlantic Works*, 107 Mass. 104; *Weick v. Lander*, 75 Ill. 93; *Ricker v. Freeman*, 50 N. H. 420; *Lake v. Milliken*, 62 Me. 240.

**SAME—THE INJURY AS BEING SUCH AS OUGHT  
TO HAVE BEEN ANTICIPATED.\***

Mr. Wharton, in his work upon Negligence,<sup>22</sup> says: "Negligence, or a want of ordinary care, contributing to an act causing injury, is not excused because the particular injury or consequences could not reasonably have been foreseen. The fact is that the consequences of negligence are often, if not invariably, surprises. A man may be negligent a thousand times in a particular matter without mischief; yet the mischief, when it occurs, may be imputable to the negligence. Hence, it is no defense that a particular injurious consequence is improbable, and not to be reasonably expected, if it really appear that it naturally followed from the negligence under examination." It will be demonstrated that the concluding part of the above quotation is not quite accurate, in view of the decisions of the courts. "Yet, on the other hand, it is not to be assumed that a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." As stated by Pollock, C. B.: "I am inclined to consider the rule to be this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur." †

"An act which is not in itself dangerous, or from which negligence cannot be necessarily and naturally inferred, or

\* See note, p. 449.

<sup>22</sup> Section 77.

† *Greenland v. Chaplin*, 5 Exch. 248.

an act from which injurious consequences would not be reasonably expected or apprehended, by a person of common prudence, is not an act of negligence. To determine whether an act is negligent, its character, and all its qualities, and all of the circumstances under which it was done, must be known and considered. It is incumbent, in all such cases, upon the plaintiff, to prove the negligence as an independent and affirmative fact, although such fact may be inferred from such other facts in evidence as lead directly and logically to such a conclusion. Negligence cannot be inferred from any mere act which is the cause of an injury, unless such injury is the necessary or usual and ordinary consequence of such act; and negligence ought not to be imputed, without proof, when injurious consequences were scarcely ever known to follow such an act.”<sup>23</sup>

The facts in the case from which the foregoing language is taken were: “A station agent left a kerosene lamp burning after midnight in defendant’s telegraph office, upon a bracket attached to a window frame in the partition between such office and the plaintiff’s warehouse. Before morning such warehouse and contents were destroyed by fire. It was held that, even assuming that the fire was caused by the burning lamp,—which only rested in conjecture,—there was no proof that the act of so leaving the burning lamp was negligence.”

As illustrative of the rule, the recent case of *Harris v. Cameron*<sup>24</sup> is strongly in point. A father purchased an airgun for his son, who was 11 years old. This boy lent it to another boy, who aimed it at a third, discharging it, thereby destroying his eye. It was sought to charge the father, who purchased the gun, with liability for the injury

<sup>23</sup> *Ward v. Railway Co.*, 29 Wis. 144.

<sup>24</sup> 81 Wis. 239, 51 N. W. 437.

thus caused, on the ground of his negligence in purchasing the gun, and giving it to his minor son. The court held, as matter of law, that such acts of the parent were not culpable negligence, nor could he reasonably have anticipated the improper use of it by a boy to whom his son lent it, resulting in an injury to another boy, nor would it have been negligence if the defendant's own son had committed the act, because he could not have reasonably anticipated or expected such a result. He was only chargeable with ordinary care, such as fathers would generally exercise under such circumstances. To the same effect are the cases of *Hagerty v. Powers*,<sup>25</sup> *Chaddock v. Plummer*,<sup>26</sup> and *Poland v. Earhart*.<sup>27</sup>

In *Hoadley v. Northern Transp. Co.*<sup>28</sup> the court say: "The injury must be shown to be the direct consequence of the defendant's negligence. This is the only practical rule that can be adopted by courts in the administration of justice. It is not enough that the act charged may be one of a series of antecedent events, without which, as the result proves, the damage would not have happened. The legal damages which follow any wrong are only such as, according to common experience and the usual course of events, might reasonably have been anticipated. The defendant's liability extends only to natural and probable consequences." This case was one of a great number decided by the courts, where the defendant was sought to be charged with liability for loss of goods destroyed, upon the ground of negligence in delaying their proper forwarding; it being urged that but for such delay the goods would not have been at the place of disaster, and therefore would not have been destroyed. The court further say: "Applying these rules to

<sup>25</sup> 66 Cal. 368, 5 Pac. 622.

<sup>26</sup> 70 Iowa, 285, 30 N. W. 637.

<sup>27</sup> 88 Mich. 225, 50 N. W. 135.

<sup>28</sup> 115 Mass., on page 307.



the case at bar, it is plain the destruction of the goods by fire in the calamity which happened could not reasonably be anticipated as a consequence of the wrongful detention of them upon the wharf. The delay did not destroy the property, and there was no connection between the fire and detention.”<sup>29</sup>

In New York, however, a contrary view is held as to damage sustained by reason of delay.<sup>30</sup>

It has been stated that “the rule which requires it to be made to appear that the injury was such as might or ought to have been foreseen, in the light of attending circumstances, is no test where no intervening efficient cause is found between the original wrongful act and the injurious consequences complained of, and such consequences, although not probable, have actually followed in unbroken sequence from the original wrong-doing.”<sup>31</sup>

General language used in some of the cases would seem to justify the statement.<sup>32</sup> If the statement was confined to the extent of the injury, it would not be subject to criticism; or if it was intended only to express the rule generally accepted as correct,—“that if, by the exercise of ordinary care, the negligent party could have foreseen, or ought to have foreseen, that some injury was likely to follow from the negligent act or omission, though not the injury that actually did flow from it,”—the statement might

<sup>29</sup> *Denning v. Railroad Co.*, 13 Gray, 481; *Morrison v. Davis*, 20 Pa. St. 171; *Memphis & C. Ry. Co. v. Reeves*, 10 Wall. 176; *McClary v. Railway Co.*, 3 Neb. 44; *Daniels v. Ballantine*, 23 Ohio St. 532.

<sup>30</sup> *Condict v. Railway Co.*, 54 N. Y. 500; *Lamb v. Same*, 46 N. Y. 271; *Michaels v. Railroad Co.*, 30 N. Y. 564; *Read v. Spaulding*, Id. 630; *Bostwick v. Railway Co.*, 45 N. Y. 712.

<sup>31</sup> 16 Am. & Eng. Enc. Law. p. 436.

<sup>32</sup> *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 475; *Baltimore, etc., Ry. Co. v. Kemp*, 61 Md. 74.

be said to be correct. On the contrary, if it was intended to state a proposition that liability follows for every result of a negligent act, without regard to whether such a result, according to the experience of mankind, was to be expected, however remote or improbable, even though following in unbroken sequence from the original wrong, then such statement is not supported by authority.

As was said in *Hoag v. Lake Shore & M. S. R. Co.*:<sup>88</sup> "A man's responsibility for his negligence, and that of his servants, must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the 'reductio absurdum,' so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering to the principle that, in determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." The facts in the case to which this language was applied were that an oil train on defendant's railway was thrown from the track by a recent landslide, and, the oil tanks bursting, the oil became ignited, and ran down into an adjoining creek, swollen by recent rains, and, flowing down the creek, set fire to and destroyed the plaintiff's buildings, three or four hundred feet away. It is true, the court said, that the water was an intervening agent that carried the fire; but this remark was evidently made to avoid even an apparent conflict with a settled principle of law. If water, light, wind, air, distance, and time are to be considered as intervening causes or agents, then the statement of the author which is criticised may be correct.

<sup>88</sup> 85 Pa. St. 293.

It was held in *Pennsylvania R. Co. v. Kerr*<sup>34</sup> that air carrying sparks was an intervening agent, and in *Marvin v. Railway Co.*<sup>35</sup> it was said that wind carrying sparks was an intervening agent; but in each of these cases—certainly in the latter—the distance of the property destroyed from the original starting point of the fire was of controlling influence, and the real point of the decisions was that the consequences were too remote to be reasonably anticipated or expected.

In *Charlebois v. Railway Co.*<sup>36</sup> it was held that the company was not liable for the death of a boy downed in a pool formed by its embankment upon its right of way. The court said: "It could not be foreseen, when the embankment was made, that, immediately after a rainstorm and the formation of a pool, the deceased would climb over the embankment onto the defendant's right of way, and fall into this pool. It is not like the case of one who digs a pit near a public highway on his own land, who is made liable to a person lawfully traveling along the highway, and, by reason of darkness, steps out of it, and accidentally falls into the pit, which has been left unguarded."<sup>37</sup>

In *Henry v. Southern Pac. R. Co.*<sup>38</sup> it was said: "A long series of judicial decisions has defined proximate or immediate or direct damages to be ordinary and natural results

<sup>34</sup> 62 Pa. St. 353.

<sup>35</sup> 79 Wis. 140, 47 N. W. 1123.

<sup>36</sup> 91 Mich. 59, 51 N. W. 812.

<sup>37</sup> *Pennsylvania Ry. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Pennsylvania Ry. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431; 2 *Thomp. Neg.* p. 1085, § 2; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Pol. Torts*, 36; *Scheffer v. Washington City, M. & G. S. R. R.*, 105 U. S. 249; *Lane v. Atlantic Works*, 111 Mass. 136; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391.

<sup>38</sup> 50 Cal. 183.

of the negligence, such as are usual, and therefore might have been expected.”<sup>39</sup>

In *Chicago v. Starr* the facts were that a child was killed by a counter, which had been left on the sidewalk for some weeks, falling upon him. The court said that, while the counter was an obstruction, it was a very slight one. During the two or three weeks it remained there, it probably never occurred to any one who saw it that human life or limb would be jeopardized by its presence there. The most prudent and cautious person would never have anticipated such an accident.

The cases which are cited as sustaining a contrary rule are not generally adverse to the doctrine herein stated; rather, they proceed upon the ground that if some injury might and ought reasonably to have been foreseen, then the fact that the particular injury might not thus have been anticipated does not exempt the negligent party.

In the case of *Milwaukee & St. P. Ry. Co. v. Kellogg*<sup>40</sup> “the question decided was that liability was not excused from the fact that the fire was not set directly to the plaintiff’s buildings, but communicated from other buildings ignited.”

The case of *Higgins v. Dewey*<sup>41</sup> was to the effect that a person who sets a fire on his own land negligently is liable for injury done by its direct communication to his neighbor’s land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated.

In *Baltimore, C. P. Ry. Co. v. Kemp*<sup>42</sup> the court say: “It

<sup>39</sup> 42 Ill. 174.

<sup>40</sup> 94 U. S. 409.

<sup>41</sup> 107 Mass. 494.

<sup>42</sup> 61 Md. 74.

is not simply because the relations of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate causes of the wrongful act are to be regarded. It is only when there may be a more direct and immediate and sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given effect can be directly traced to a particular cause as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under like conditions of things, produce like results? Hence the general rule is that, in actions of tort like the present, the wrongdoer is liable for all the direct injury resulting from his wrongful act; and that, too, although the special nature of the resulting injury could not with certainty have been foreseen or contemplated as the probable result of the act done."

The case of *Miller v. Railway Co.*<sup>43</sup> was where the defendant, by allowing fire to escape from its engine, set fire to combustible material on the right of way, which spread to an adjoining fence, and burned it. Cattle came in, and destroyed plaintiff's crops. It was ruled that he could recover the damage thus caused by the cattle; that the consequence was a natural and ordinary result that might have been anticipated.

In *Kellogg v. Railway Co.*<sup>44</sup> the court say, after a very complete review of the authorities: "It will be observed that the rule as we find it laid down, and as we believe it to be, is not that the injury sustained must be the necessary or unavoidable result of the wrongful act, but that it shall be the natural and probable consequence of it, or one likely to

<sup>43</sup> 90 Mo. 389, 2 S. W. 439.

<sup>44</sup> 26 Wis. 281.

ensue from it. The damage is too remote if, according to the usual experience of mankind, the result was not to be expected."

The same court, in a later case,<sup>45</sup> in an exhaustive opinion come to a conclusion which is stated in the following language: "We think the decided weight of authority is in favor of the rule that, in an action for negligence, the defendant has the right to have the question submitted to the jury whether the result which is the ground of action might, under all the circumstances, have been reasonably expected, not by the defendant, but by a man of ordinary intelligence and prudence. It would seem that it is not enough to prove that the result is the natural consequence of the negligence, although that fact would be evidence tending to show that it might have been reasonably expected. A person is not called upon to use that degree of care against an improbable result which he would be bound to use against a probable one. A man is not bound to ward against a result which cannot be reasonably expected to occur, and negligence cannot be attributable to him in failing to do so."

The same conclusion is stated by Judge Redfield in the following words: "The defendant is liable for all those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration."

The authorities in support of the proposition that, in an action to recover damages for the negligent act of the defendant, the plaintiff must, in order to establish the fact that the negligence of the defendant was the proximate cause of the injury complained of, show that it was reason-

<sup>45</sup> *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 163, 18 N. W. 764.

able to expect that such injury would result from such negligence, are very numerous, and of controlling weight.<sup>46</sup>

<sup>46</sup> *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764; *Delaware, L. & W. Ry. Co. v. Salmon*, 39 N. J. Law, 311; *Kellogg v. Railway Co.*, 26 Wis. 281; *Lake v. Milliken*, 62 Me. 240; *Morrison v. Davis*, 20 Pa. St. 171; *Scheffer v. Railway Co.*, 105 U. S. 249; *McDonald v. Snelling*, 14 Allen, 290; *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 5 C. C. A. 347, 55 Fed. 949; *Union Pac. Ry. Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 989; *Harrison v. Berkley*, 1 Strob. 525; *Pittsburg S. Ry. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580; *Louisville & N. Ry. Co. v. Guthrie*, 10 Lea, 432, 478.

## CHAPTER XXI.

## CONTRIBUTORY NEGLIGENCE (Continued).

**A party is not exempt from liability for negligence because another's negligence concurred, p. 433. Concurring and intervening causes distinguished, pp. 434, 436, 437.**

**Fellow servant's or third person's negligence, concurring with master's, is no defense, pp. 434, 439.**

**Affirmative showing as to which was the proximate cause is necessary, p. 434.**

**Reason for the rule, p. 436.**

**Accident concurring with defendant's negligence no defense, p. 436, 444.**

**Contributory negligence no defense if its consequences might have been avoided by defendant, p. 446.**

## CONCURRING CAUSES.\*

The rule may be thus stated: When the injury is the result of two concurring causes, one party is not exempt from full liability although another party was equally culpable.<sup>1</sup>

Wharton states the doctrine thus: The fact that another person contributed, either before the defendant's interposi-

\* See note, p. 449.

<sup>1</sup> Lake v. Milliken, 62 Me. 243; Chapman v. Railroad Co., 19 N. Y. 341; Ricker v. Freeman, 50 N. H. 420; Johnson v. Railway Co., 31 Minn. 57, 16 N. W. 488; Bartlett v. Boston G. L. Co., 117 Mass. 536; Small v. Railroad Co., 55 Iowa, 582, 8 N. W. 437; Oil City Gas Co. v. Robinson, 99 Pa. St. 1; Baltimore & P. Ry. Co. v. Reaney, 42 Md. 117.



tion or concurrently with such interposition, in producing the damage, is no defense.<sup>2</sup>

Care must be taken, in the application of the rule, to distinguish between concurring causes and intervention of causes. This may not always be free from difficulty. An intervening cause—that is, a force or power intervening—must be subsequent in time. It must be a new or independent force or power.<sup>3</sup> It must be of itself sufficient to stand as the cause of the misfortune.<sup>4</sup> It need not necessarily be the act of a responsible human agency.<sup>5</sup> It must be a cause which interrupts the natural sequence of events, turns aside their force, prevents the natural and probable result of the original act or omission, and produces a result that could not reasonably have been anticipated.<sup>6</sup>

The concurrent or succeeding negligence of a fellow servant or a third person, which does not break the sequence of events, is not such a cause, and constitutes no defense for the original wrongdoer, although, in the absence of the concurrent or succeeding negligence, the accident would not have happened.<sup>7</sup>

But where the injury may result from one of two causes, either of which may be the proximate cause, the plaintiff must show affirmatively which was the proximate cause.<sup>8</sup> And he must fail, also, if it is just as probable that the

<sup>2</sup> Whart. Neg. § 144.

<sup>3</sup> Insurance Co. v. Boon, 95 U. S. 130.

<sup>4</sup> Insurance Co. v. Tweed, 7 Wall. 44.

<sup>5</sup> Whart. Neg. §§ 114–155.

<sup>6</sup> Union Pac. Ry. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 989; Martin v. Iron Works, 31 Minn. 407, 18 N. W. 109.

<sup>7</sup> Union Pac. Ry. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 989; Martin v. Iron Works, 31 Minn. 407, 18 N. W. 109; Ricker v. Freeman, 50 N. H. 420; Burrows v. Coke Co., L. R. 5 Exch. 67.

<sup>8</sup> Baltimore & P. Ry. Co. v. Reaney, 42 Md. 117; Searles v. Rail-

injury was caused by the one as the other, as the plaintiff is bound to make out his case by a preponderance of the evidence.

The jury must not be left to a mere conjecture; and a bare possibility that the damage was caused in consequence of the negligence or unskillfulness of the defendant is not sufficient.<sup>9</sup>

The rule is stated in New York, as to defective highways, that "where two causes combine, both of which are in their nature proximate,—the one being a culpable defect in a highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect."<sup>10</sup>

In Maine and Massachusetts a contrary rule is held,—that the town is not liable. These rulings are based largely upon two grounds: That the town is liable for the defect alone, and that the proportion of the injury due to that cause is impossible to be ascertained.<sup>11</sup>

The New York rule is held in Vermont and New Hampshire.<sup>12</sup>

In New York, the defect, even when a concurring cause, must be such that without its operation the accident would not have happened.<sup>13</sup>

The negligence of each person is a proximate cause,

way Co., 101 N. Y. 661, 5 N. E. 66; Taylor v. City of Yonkers, 105 N. Y. 209, 11 N. E. 642.

<sup>9</sup> Searles v. Railway Co., 101 N. Y. 661, 5 N. E. 66; Taylor v. City of Yonkers, 105 N. Y. 209, 11 N. E. 642.

<sup>10</sup> Ring v. City of Cohoes, 77 N. Y. 83.

<sup>11</sup> Moore v. Abbott, 32 Me. 46; Moulton v. Sanford, 51 Me. 127; Marble v. Worcester, 4 Gray, 395; Billings v. Worcester, 102 Mass. 329.

<sup>12</sup> Hunt v. Pownal, 9 Vt. 411; Winship v. Enfield, 42 N. H. 197.

<sup>13</sup> Taylor v. City of Yonkers, 105 N. Y. 209, 11 N. E. 642.

where the injury would not have occurred but for that negligence;<sup>14</sup> and it is no answer that the negligence or trespass of a third person contributed to the injury.<sup>15</sup> And this is true, although the party contributing by his negligence was acting without concert with, and entirely independent of, the party to whom the cause is attributable in the first instance.<sup>16</sup>

The reason of the rule lies in the fact that the effects produced by two or more concurrent causes cannot be separated, and the damages apportioned; that, because such may be the case, the injured party should not be refused redress. The rule always has been, in case of joint tortfeasors, that either or all are liable.<sup>17</sup>

It is no defense for a person, against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another.<sup>18</sup>

In case the injury is caused by accident, and the defendant's negligence concurs to the extent that the accident would not have happened but for such negligence, he is liable for the consequences.<sup>19</sup>

The distinction between concurring causes and intervening causes lies, not so much in the character of the act

<sup>14</sup> *Johnson v. Northwestern Tel. Exch. Co.*, 48 Minn. 433, 51 N. W. 225.

<sup>15</sup> *Eaton v. Railroad*, 11 Allen, 505.

<sup>16</sup> *Illidge v. Goodwin*, 5 Car. & P. 190; *Eaton v. Railroad*, 11 Allen, 505.

<sup>17</sup> *Cooley*, Torts, § 153; *Woodbridge v. Conner*, 49 Me. 353; *Barden v. Felch*, 109 Mass. 154; *Slater v. Mersereau*, 64 N. Y. 138; *Pittsburg, etc., Ry. Co. v. Spencer*, 98 Ind. 186.

<sup>18</sup> *Webster v. Railroad Co.*, 38 N. Y. 260; *Colegrove v. Railroad Co.*, 20 N. Y. 492; *Slater v. Mersereau*, 64 N. Y. 138.

<sup>19</sup> *Eaton v. Railroad*, 11 Allen, 500; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75.

done or omitted, but its effect upon the result,—the difference between contribution and cause and effect; and to this it must be added that the concurrent or succeeding negligence must break the sequence of events to make the cause one of intervention. The only available test is, did the intervening cause, whether animate or inanimate, break the sequence of events? If so, it is a case of intervening negligence; otherwise, a case of coöperating, concurring, or contributory negligence.<sup>20</sup>

The distinction is very well illustrated and discussed in *Atkinson v. Goodrich Transp. Co.*<sup>21</sup> This was an action brought to recover damages sustained by reason of the alleged negligence of the defendant by carelessly permitting sparks to escape from its boat, which ignited a fire in some shavings and sawdust lying near a planing mill, which communicated to the mill, which was burned, as also to a large number of other buildings, which were also burned; the one in question being situate from the mill 3,500 feet. It was contended upon the trial that the negligence of the mill owner (the jury having found his act negligent) in permitting the sawdust and shavings to remain and accumulate, under the circumstances, was such an intervening cause between the negligence of the defendant and the final destruction of the plaintiff's house that its destruction must be, in the law, attributed to such intervening cause. The court held that the negligent act of the mill owner was a concurrent cause; not an intervening one. They say: "It is true, the sparks were first emitted from the defendant's boat, and the action of such sparks upon the combustible material was subsequent in point of time; yet the negligence of the mill owner was a continuing negligence. It

<sup>20</sup> *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 474.

<sup>21</sup> 60 Wis. 141, 18 N. W. 764.

was present and acting at the time of the negligence of the defendant. It aided in kindling the fire, and spreading it to the mill, and from that to the surrounding buildings."

The case of *Lake v. Milliken*,<sup>22</sup> often quoted, furnishes an apt illustration of the doctrine. There a person negligently piled boards in a street, and another person driving along the street, with his wagon loaded with barrels, went over the boards, causing the boards and barrels to rattle. The plaintiff was following in his wagon, driving a horse well broken, and under his control, at a moderate pace. His horse became frightened at the rattling of the boards and barrels, and started suddenly,—too quickly for the plaintiff to stop him; jumped sidewise, striking a lamp post, and throwing plaintiff out, and injuring him. It was urged that the negligence of the driver of the wagon which was loaded with the barrels was an intervening cause. The court held it to be a concurrent cause. The facts and the result were somewhat similar in *Pastene v. Adams*.<sup>23</sup>

In a recent case decided by the supreme court of Minnesota<sup>24</sup> the doctrine is further illustrated. The court state the rule: "Where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence is the cause of the injury." That action was for an injury caused by the falling in the street of one of the poles of the defendant, on which were suspended its line wires. The alleged negligence was that the pole was decayed. It had been guyed to a neighboring building, with license from the owner. Such license was afterwards revoked. The owner of the building cut the

<sup>22</sup> 62 Me. 240.

<sup>23</sup> 49 Cal. 87.

<sup>24</sup> *Johnson v. Northwestern Tel. Exch. Co.*, 48 Minn. 433, 51 N. W. 225.

guys which stayed the pole, and the pole, in consequence thereof, fell into the street, causing the injury complained of. It was urged that the act of the owner of the building in cutting the guy was an intervening cause. The court held such act to be a concurring and contributory cause.

### CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.\*

Having illustrated and discussed the doctrine of proximate cause and concurring negligence, and ascertained the reasoning upon which they are applied, we are now prepared to apply such doctrines to the subject of the work in hand.

The principle is universal that, where the negligence of the principal and that of a fellow servant together produce injury, the principal is liable therefor.<sup>25</sup>

The liability proceeds upon the ground of concurring negligence. The mere fact of the concurrence of one who stands in the relation of a fellow servant to the one receiving injury does not exonerate the master from his original fault. The servant assumes the risk of the negligence of the fellow

\* See note, p. 449.

<sup>25</sup> Cowan v. Railway Co., 80 Wis. 284, 50 N. W. 180; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493; Avilla v. Nash, 117 Mass. 318; Paulmier v. Railway Co., 34 N. J. Law, 155; Booth v. Railroad Co., 73 N. Y. 38; Cone v. Railway Co., 15 Hun, 172; Boyce v. Fitzpatrick, 80 Ind. 526; Pittsburgh, C. & St. L. Ry. Co. v. Henderson, 37 Ohio St. 549; Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451; Cone v. Railroad Co., 81 N. Y. 206; Elmer v. Locke, 135 Mass. 575; Griffin v. Railroad Co., 148 Mass. 143, 19 N. E. 166; Lane v. Atlantic Works, 111 Mass. 136; Clark v. Soule, 137 Mass. 380; Joyce v. City of Worcester, 140 Mass. 245, 4 N. E. 565; Stetler v. Railway Co., 46 Wis. 497, 1 N. W. 112; Stetler v. Railway Co., 49 Wis. 609, 6 N. W. 303; Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764; Sherman v. Menominee River Lumber Co., 72 Wis. 122, 39 N. W. 365; Cayzer v. Taylor, 10 Gray, 274.

servant, but not that of the master. This question is frequently before the courts. It is well illustrated in the recent case of *Cowan v. Railway Co.*<sup>26</sup> Death resulted to an employé of defendant from the breaking of a defective brake; the broken end of the rod itself showing a flaw or an old crack extending more than halfway through it. The evidence was sufficient to sustain a finding that proper inspection on the part of the defendant ought to have discovered the flaw. The injured employé was a sectionman. The car was sent down a grade. The brakerod broke, which deprived the person in charge of the car of all control over it. It collided with the deceased, causing his death. There was some evidence tending to show negligence on the part of the section foreman which contributed to the injury. The court held that, even if the foreman was guilty of negligence, the proximate cause of the injury was the failure to discover the defect in the brakerod; and the subsequent negligence of the foreman, if any, though he was a fellow servant with the deceased, did not exonerate the defendant. Such negligence of the foreman was a concurrent, and not an intervening, cause.

In *Clark v. Soule*<sup>27</sup> it was held that, where the master furnished defective materials for a staging to be constructed by his employés, he was not excused from the consequences of such negligence by the fact that the negligence of a fellow servant concurred in producing injury to an employé in making use of such materials.

*Sherman v. Menominee River Lumber Co.*<sup>28</sup> was an action where the negligence of the master consisted in permitting an edger in his mill to remain out of repair. An employé was injured by the negligent use of such machinery

<sup>26</sup> 80 Wis. 284, 50 N. W. 180.      <sup>27</sup> 137 Mass. 380.

<sup>28</sup> 72 Wis. 122, '39 N. W. 365.

by a fellow servant, without whose negligence—that is, if the machine had been properly used—the accident and consequent injury would not have happened. The court say: “We think it clear, from the evidence, that if the machine was out of repair, as claimed by plaintiff, then the use of it in the mill, even by the most careful men, was more dangerous to the men working in its vicinity than the use of a perfect machine. The defendant was culpable, therefore, in permitting the use of such an imperfect machine. Now, if the defendant has, by its neglect, unnecessarily increased the danger attendant upon the use of the machine, it is liable for an injury to an employé, who is not himself guilty of negligence, resulting from the use of such imperfect and dangerous machine; and it is no excuse for defendant that some of its employés were careless in the use of such dangerous machine, and that, if it had been carefully handled, the accident would not have occurred. We are of the opinion that the negligence of the co-employé of the plaintiff, under such circumstances, would not excuse the defendant, but would simply be negligence contributing to the injury caused by the negligence of the defendant, and both the co-employé and the defendant would be liable to the plaintiff.”

The first part of the foregoing statement by the learned court is misleading. In so many words, they say it was the duty of the defendant to furnish a perfect machine; that the use of one not perfect is, for that reason, unnecessarily dangerous. I do not think the court had in mind the force of the language used, nor do I think they intended to adopt a rule that machinery must be perfect and absolutely safe, but rather that the duty of the master is to furnish that which is reasonably safe, and the safety has reference to being reasonably safe when properly used. Such is the rule everywhere, and Wisconsin probably does not inten-



as where the master owes to his servant other duties, such as command and superintendence, which, under the law, he could not delegate, but were personal to himself, and such duties were negligently performed, either by himself or by those who directly represented him in their performance, and the employé upon whom devolved the duty of execution was also negligent in the performance of his duty when a fellow servant. The rule may apply in other cases, and does apply, as we have seen, when the negligent act or omission of the master increases the hazard of the employment; when the negligence of the master in the first instance is continuing, and the neglect of the servant co-operates with it, giving it force, and carrying it forward to its final result.

#### ACCIDENT AND FAULT COMBINED.

Another principle involved in, or growing out of, the doctrine of concurrent negligence, and which has before been incidentally mentioned, is: "If the injury is the combined result of an accident and negligence, and the accident would not have happened but for such negligence, and the danger could not have been foreseen or avoided by ordinary care and prudence on the part of the person receiving such injury, then the person guilty of such neglect or want of care will be liable to the party injured.

This distinction assumed a definite relation, as such, in the case of *Palmer v. Inhabitants of Andover*.<sup>33</sup> No new rule is applied, but merely a distinctive name given to an old rule or exception. The question has become most prominent in highway cases, yet the principle is applicable to other cases involving negligence. The question still is, was the defendant guilty of any want of ordinary care, and was

<sup>33</sup> 2 Cush. 600.

the plaintiff free from a want of such care? Was such want of ordinary care on the part of the defendant the proximate cause of the injury? It may be such proximate cause if the accident or injury would not have happened but for it. Then, if the contributing cause was one of pure accident, it of itself will not exonerate the defendant. Whether the defendant, or an ordinarily prudent person in his situation, ought or ought not to have reasonably expected such a result, is a question which relates to his negligence.

Illustrations: Horses becoming frightened, and momentarily beyond control; breaking of portions of a harness or carriage, when it could not have been foreseen; and the like,—are pure accidents; and if, by reason thereof, injury ensues by reason of the negligence of another, which could not have occurred but for such negligence, a recovery may be upheld.<sup>34</sup>

#### CONSEQUENCES OF CONTRIBUTORY NEGLIGENCE AVOIDABLE.

The rule may be stated thus: Although contributory negligence may exist, yet it will not disentitle the injured party from recovery, if, by the exercise of ordinary care on the part of the defendant, the consequences of such contributory negligence might have been avoided.<sup>35</sup>

<sup>34</sup> *Hunt v. Pownal*, 9 Vt. 418; *Farnum v. Concord*, 2 N. H. 392; *Howard v. North Bridgewater*, 16 Pick. 189; *City of Aurora v. Pulfer*, 56 Ill. 270; *City of Joliet v. Verley*, 35 Ill. 58; *City of Bloomington v. Bay*, 42 Ill. 503; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Hey v. Philadelphia*, 81 Pa. St. 44; *Titcomb v. Railway Co.*, 12 Allen, 254; *Clark v. Barrington*, 41 N. H. 44; *Kelsey v. Glover*, 15 Vt. 708; *Morse v. Town of Richmond*, 41 Vt. 435; *Woodward v. Aborn*, 35 Me. 271; *Hull v. Kansas City*, 54 Mo. 598.

<sup>35</sup> *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 558, 11 Sup. Ct.

The supreme court of the United States, in a recent case, in stating this doctrine, say: "Although the rule is that, if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributing negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."<sup>36</sup>

It is equally true that if the plaintiff, by the exercise of ordinary care, could have discovered the negligence of the defendant in time to have avoided the injury, and did not do

653; *Radley v. London & N. W. Ry. Co.*, 1 App. Cas. 754; *Scott v. Dublin W. Ry. Co.*, 11 Ir. C. L. 377; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Lucas v. Railway Co.*, 6 Gray, 72; *Northern Cent. Ry. Co. v. State*, 29 Md. 420; *Williamson v. Barrett*, 13 How. 101; *Trow v. Vermont Cent. R. Co.*, 24 Vt. 492; *Ward v. Railway Co.*, 85 Wis. 601, 55 N. W. 771; *Donohue v. Railway Co.*, 91 Mo. 357, 2 S. W. 424, and 3 S. W. 848; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 429, 12 Sup. Ct. 679; *Schierhold v. Railroad Co.*, 40 Cal. 447; *Isbell v. Railway Co.*, 27 Conn. 393; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *McKean v. Railroad Co.*, 55 Iowa, 192, 7 N. W. 505; *Romick v. Railway Co.*, 62 Iowa, 167, 17 N. W. 458; *Pacific R. Co. v. Houts*, 12 Kan. 328; *O'Brien v. McGlinchy*, 68 Me. 552; *People's, etc., Ry. Co. v. Green*, 56 Md. 84; *Whalen v. Railroad Co.*, 60 Mo. 323; *Bunting v. Railroad Co.*, 16 Nev. 277; *State v. Manchester & L. R. R.*, 52 N. H. 528; *Gunter v. Wicker*, 85 N. C. 310; *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698; *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860, 12 S. E. 946; *Dun v. Railroad Co.*, 78 Va. 645.

<sup>36</sup> *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 558, 11 Sup. Ct. 653.

so, or could have avoided such injury by the exercise of ordinary care, then he cannot recover.<sup>37</sup>

"The reason for the rule that plaintiff cannot recover for the negligence of the defendant, if his own want of care has in any degree contributed to the result complained of, is that, both parties being at fault, there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant. The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the dangers is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault; and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being the sole ground of his exemption from liability, it follows that such exemption from liability cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover is limited by the reason upon which it is founded. A wrongdoer is not an outlaw, against whom every man may lift his hands. Neither his limbs, life, nor property are held at the mercy of his adversary; on the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former. He is liable if he does not, if, by reason thereof, injury ensues."<sup>38</sup>

<sup>37</sup> *Gothard v. Railway Co.*, 67 Ala. 114; *Washington v. Railroad Co.*, 17 W. Va. 190.

<sup>38</sup> *Needham v. Railroad Co.*, 37 Cal. 409; *Washington v. Railroad Co.*, 17 W. Va. 190.

The reasoning of the supreme court of Connecticut in the case of *Isbell v. Railroad Co.*<sup>39</sup> is clear, forcible, and rational. It was said: "A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong. Such inattention and accident are, to a greater or less extent, incident to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances,—to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law. It is as old as the moral law itself, and is laid down in the earliest books on jurisprudence."

An apt illustration of the rule is found in *Austin v. New Jersey Steamboat Co.*<sup>40</sup> The facts were that a barge of the plaintiff became grounded in the Hudson river. A steamboat owned and manned by the defendant collided with such barge, through the negligence of the officers in charge, by reason of which the barge was sunk. The defendant's boat, while out of the channel, came in contact with some obstacle, which shoved her bow directly towards the barge, and then, becoming unmanageable, ran into the barge. It was claimed by the defendant that the negligence of the plaintiff contributed to the injury, on two grounds: First, that the tow was in the wrong place, and had committed the same fault alleged against the defendant, in endeavoring to sail east of the actual channel; and, second, was guilty of negligence in running aground, which contributed

<sup>39</sup> 27 Conn. 404.

<sup>40</sup> 43 N. Y. 75.

to the injury. The tow was grounded several hours before, and was entirely helpless at the time of the accident. The court held: "The St. John [that being the defendant's boat] and all other passing vessels were bound to regard the actual situation of the tow, and to exercise reasonable care to prevent injury. It cannot be said that plaintiff's negligence contributed to the injury. Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury."

In *Inland & S. Coasting Co. v. Tolson*<sup>41</sup> the facts were that the plaintiff signaled a passing boat, and, as the boat approached the wharf upon which she was standing, it struck the wharf with great force, causing her injury. The defendant was charged with negligence in the manner in which the boat was landed. The claim was made that the plaintiff exposed herself to peril by remaining too close to the end of the wharf. It was held that such exposure would not exonerate the defendant from the consequences to her of its negligence, if it could be shown that the defendant might, by the exercise of reasonable care and prudence, after observing her position, have avoided the consequences of the plaintiff's negligence.

#### NOTE TO CHAPTERS XIX., XX., and XXI

##### Contributory Negligence.

We have attempted to make plain the distinction between assumed risks and contributory negligence. The first question on the part of the defense ordinarily is, where the servant has been injured by means of defective appliances or unsafe methods, as to whether the risk was one assumed by the servant. Whether or not the servant acted with due care is immaterial. Having accepted the risk as an incident to his employment, he cannot complain if it be such

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<sup>41</sup> 139 U. S. 551, 11 Sup. Ct. 653.

as could not ordinarily be performed, even by the exercise of due care. If the risk was not one assumed, then the inquiry arises as to whether the servant was in the exercise of due care. Courts have confused this subject by failing to make the distinction, often placing decisions upon the broad ground of contributory negligence, when in fact they determined that the servant assumed the risk. In citing precedents in these notes, it is quite probable that we may fail in some instances, for this reason, to note the distinction.

*Holum v. Railway Co.*, 80 Wis. 299, 50 N. W. 99, was one of a number of cases where the court placed the defense upon the ground of contributory negligence, when in fact they determined that the plaintiff, from his knowledge of the unblocked frog, had assumed the risk.

In *Kroy v. Railroad Co.*, 32 Iowa, 357, it was held that a brakeman, injured while uncoupling moving cars, was guilty of contributory negligence; that such an act is not necessary, though customary. In speaking of such custom, the court say: "Having lent his aid to establish such a custom, and afterwards, without complaint or protest, continued in the defendant's employ, he must be presumed to have taken upon himself all the risks incident to the conduct of the business in the manner which he assisted to establish."

In *Finnell v. Railroad Co.*, 129 N. Y. 669, 29 N. E. 825, it was held that it was negligence on the part of a brakeman to jump from the tender into the middle of the track as it approached the car, and walk with it, adjusting the pin and link to make the coupling; that it was also negligence, on his part, not to observe the condition of the track, where he had to perform his service.

In *Pennsylvania Co. v. Hankey*, 93 Ill. 580, the facts were very similar to those in the New York case. It was said that it nowhere appears that it is the duty of brakemen to walk on the track while changing links or coupling cars on such a track; also, that it was the duty of the servant to observe the condition of the track.

In *Thompson v. Railroad Co.*, 153 Mass. 391, 26 N. E. 1070, it was held negligence for a brakeman to jump off from a moving train in order to board another car to set brakes; and especially so, not to look to see what his footing might be, or whether there were any obstructions that might cause him injury. The court say: "The plaintiff offered to prove that, in jumping on and off the train at the time of the injury, he was doing only what was ordinarily done by the employes engaged in like employment, and under similar circum-

stances, with the knowledge and approval of the defendant's superintendent. We do not understand by this that the plaintiff offered merely to show that the brakeman of a train jumped on and off when the train was moving at 'only a fast walk,' which was the testimony as to the train in question. But we understand that the offer was to show that they did so without looking, or being able to look, where they would alight, or what obstructions they would meet. If they thus acted, it would only certainly prove that they were habitually reckless and careless. They could not by such conduct make the railroad responsible for the injury occasioned to them thereby, even if it met the approval of the superintendent."

The rule is stated in *Daley v. American Print. Co.*, 152 Mass. 581, 26 N. E. 135, thus: Where it is within the duty or scope of the employment of a servant to perform a particular service, which is attended with some danger, and where it becomes incumbent on him to show that on a particular occasion he was in the exercise of due care, evidence is competent in his behalf to show that he conducted himself in the usual and ordinary way in which similar acts were done by persons engaged in like employment. *Snow v. Railway Co.*, 8 Allen, 441. It was accordingly held that where employes, in adjusting a belt (which frequently slipped off from the pulley), by standing on a hogshead which had been thus used by employes for years, this fact might be shown as tending to prove ordinary care on the part of a servant injured while using the hogshead in replacing the belt.

In *Baltimore & P. R. Co. v. Jones*, 95 U. S. 443, the court define negligence as the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. This is hardly consistent with the rule laid down in *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, which we criticise in the first chapter of this work.

The court further say: "One who, by his negligence, has brought an injury on himself, cannot recover damages for it; but where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such case is (1) whether the injury was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the



plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not."

The facts under consideration in this case were that the plaintiff was riding on the pilot of an engine, when it collided with other cars on the track. The employés on the train were accustomed to ride on the pilot. The plaintiff was not a trainman, but one of a gang of laborers who were working with the train and trainmen. He had been forbidden to ride on the pilot. The court say: "There was room for him, and he should have taken his place, in the box car. The knowledge, direction, or assent of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. His injury was due to his own recklessness and folly. He was himself the author of his misfortune."

The facts in this case are somewhat similar to the facts in *Doggett v. Railway Co.*, 34 Iowa, 284. There the servant was voluntarily riding on the tender,—a place more dangerous than in the caboose. The court held he was guilty of contributory negligence. See, also, *Hickey v. Railway Co.*, 14 Allen, 429; *Todd v. Railway Co.*, 3 Allen, 18, 7 Allen, 207; *Galena & C. U. R. Co. v. Yarwood*, 15 Ill. 468.

It was held that a foreman of a crew of wreckers who boarded a wild train to reach the scene of a wreck, and, contrary to rules, rode in the cab of the engine, was guilty of contributory negligence. *Abend v. Railway Co.*, 111 Ill. 202.

In *Lehigh Val. R. Co. v. Greiner*, 113 Pa. St. 600, 6 Atl. 246, the servant was charged with contributory negligence in riding on the rear platform of tender.

In *Murray v. Railway Co.*, 73 Tex. 2, 11 S. W. 125, a fireman was charged with contributory negligence in attempting to mount the tender by the rear end, even though the handhold was insecure and gave way.

The same was held in *Dowell v. Railway Co.*, 61 Miss. 519, where the employé recklessly attempted to board a moving train; and also in *Chambers v. Railroad Co.*, 91 N. C. 471.

It was held negligence for laborers in the employ of the company to jump on a moving train, in the following cases: *Novock v. Rail-*

road Co., 63 Mich. 121, 29 N. W. 525; *Martensen v. Railroad Co.*, 60 Iowa, 705, 15 N. W. 569.

It is negligence per se for a brakeman to jump from the pilot of a moving engine onto the track in front, to attend a switch; and evidence that it was the custom on defendant's road and other well-regulated roads for brakemen, when doing switchwork, to ride on the pilot, and to leave it, in order to do the switching, before coming to a full stop, was properly excluded. *Andrews v. Railroad Co.* (Ala.) 12 South. 432.

A railroad employé on the pilot of an engine running backward, and drawing freight cars, is guilty of contributory negligence where, without real necessity therefor, he steps off in the dark, and at a place with which he is acquainted, without using his lantern, which he has in his hand, and by the use of which he could see a low embankment so close to the track as to render an attempt to alight dangerous. *Burgin v. Railroad Co.* (Ala.) 12 South. 395.

Where it was shown that an experienced brakeman got off the train at a station, though unnecessary in the discharge of any duty, and did not attempt to get on the train before it was in motion; that he walked along the train as it was moving, and passed several cars with ladders on, without attempting to get aboard; that he went to the rear end of a car not belonging to defendant, and attempted to board the train; that, in attempting to get on top of car, the handhold pulled out of the wood, which had become rotten, and he fell under the train; that he was familiar with a rule of the company forbidding jumping on or entering between the cars in motion,—held, he was guilty of contributory negligence. *Wilson v. Railroad Co.*, 94 Mich. 20, 53 N. W. 797.

In *Kelley v. Railway Co.*, 50 Wis. 381, 7 N. W. 291, it was held not to be contributory negligence, as matter of law, for an employé, seeing cars about to collide, to mount them in order to prevent the collision.

Where the rules of the company forbid the making of a flying switch, and employé has knowledge of such rule, if injured while engaged thereat he cannot recover. *Pilkinton v. Railway Co.*, 70 Tex. 226, 7 S. W. 805; *Reagan v. Railway Co.*, 93 Mo. 348, 6 S. W. 371; *Alexander v. Railway Co.*, 83 Ky. 590; *Greenwald v. Railway Co.*, 49 Mich. 197, 13 N. W. 513.

An experienced switchman performing his duties between tracks,

where, with the exercise of care, they may be performed safely. cannot recover if he fails to observe the danger from approaching cars; and it is not a sufficient excuse that his duties necessarily absorbed his attention. *Cincinnati, I., St. L. & C. Ry. Co. v. Long*, 112 Ind. 167, 13 N. E. 659.

Though the footboard of a railroad engine was slanting, and a switchman's death was caused thereby, the company would not be liable if he negligently got in front of the moving engine, and, without care, attempted to get on the footboard, and slipped and fell. *O'Mellia v. Railroad Co.*, 115 Mo. 205, 21 S. W. 503.

An experienced switchman is not guilty of contributory negligence, as matter of law, in standing near the track, in front of a slowly moving engine, and in attempting to get on the footboard as the engine reached him, where it appears that there is no rule of the company forbidding it, though done daily for eight years in the presence of the company's officers. *Id.*

A switchman who is injured while violating a positive rule of the company, which forbids jumping on switch engines while they are in motion, by standing in the middle of the track, and stepping onto the footboard, is guilty of contributory negligence. *Francis v. Railroad Co.*, 110 Mo. 387, 19 S. W. 935.

Where the record fails to show whether it is customary and prudent for switchmen to mount cars to uncouple them, it cannot be said, as matter of law, that plaintiff was guilty of contributory negligence in so doing. *Rutledge v. Railway Co.*, 110 Mo. 312, 19 S. W. 38.

Where there was evidence that plaintiff was injured in trying to uncouple cars while they were in motion; that defendant's rules did not forbid uncoupling cars in motion, and that it was the common custom of the yard to do so; that the work of the yard could not well be done without uncoupling cars in motion; that plaintiff would not have been injured but for an unblocked frog which caught his foot,—held, that the question of contributory negligence was for the jury. *Ashman v. Railroad Co.*, 90 Mich. 567, 51 N. W. 645.

Where a switchman undertook to uncouple cars, and stood on steps of tender, upon which there was no railing, and nothing to hold by, except the tool box, which that morning had been broken; and where the fireman running the engine suddenly, and without warning, reversed it, causing a violent jerk, which threw the plaintiff from the step, and he testified there would have been no danger

but for the jerk,—held, he was guilty of contributory negligence. *Lyttle v. Railway Co.*, 84 Mich. 289, 47 N. W. 571.

Where the negligence charged against a railroad company is that of keeping him in service beyond human endurance, and it appeared that it was optional with him whether he made the trip, and that before going he found he was to get extra pay; and where the accident and injury to him was caused by his running while asleep into a standing train, of which he had been warned; and where it also appeared that the flagman of the standing train had neglected his duty in signaling any approaching train,—it was held that a nonsuit was properly directed. *Nattress v. Railroad Co.*, 150 Pa. St. 527, 24 Atl. 753.

Where an engineer is warned by a danger signal not to proceed with his train, and immediately thereafter another signal is given which indicates he may proceed with safety, but both signals are continuously displayed together, leaving it in doubt which signal should be regarded, he is negligent in going on with his train, and the company is not liable for injuries received in a resulting collision. *Devine v. Railway Co.*, 89 Ga. 541, 15 S. E. 781.

Where the negligence charged is that of the engineer in "jamming the cars too hard," it was said: "If it was plaintiff's duty to go between the cars in uncoupling, it was also his duty not to put himself where the deadwoods came together; and the engineer, knowing plaintiff was so between the cars, had a right to assume that he would keep in the space outside the deadwoods." *Alabama G. S. R. Co. v. Richle* (Ala.) 12 South. 612.

In the case of such alleged negligence on the part of the engineer. It is proper to refuse to charge that, if plaintiff could not have done his work without getting his arm between the deadwoods, he should not have done the work at all; and he cannot recover if he attempted to do the work, and was injured, where the jury might find from the evidence that the danger was not obvious. *Id.*

Though attempting to couple cars when the engine is running at a speed of 15 miles an hour is, apparently, not only dangerous, but reckless, yet if it be true, in the experience of engineers and railroad men, that it is safe, provided the engine is properly managed, and if the failure in question resulted solely from the fault of the engineer in manipulating the engine, the high speed will be no obstacle to a recovery by the car coupler for injury thus received. Though to nonexperts its truth would seem in a high degree im-

probable, if not impossible, yet, there being direct and positive evidence tending to support the theory of safety, the court erred in granting a nonsuit. *Rebb v. Railway Co.*, 87 Ga. 631, 13 S. E. 566.

A switchman riding on a switch engine, and directing its movement towards cars to be coupled, is guilty of negligence in jumping off, and walking before it on an unballasted track, while removing the coupling pin and link from the drawhead of the tender. *Finnell v. Railroad Co.*, 129 N. Y. 669, 29 N. E. 825.

He is not guilty of contributory negligence in obeying the conductor's orders to uncouple moving cars with his hands, when the uncoupling could not have been done with a stick. *Richmond & D. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361.

Whether or not a servant of a railroad company was guilty of negligence in standing on the rails of a track in attempting to couple a moving to a stationary car is a question for the jury. *Hamilton v. Rich Hill Coal Min. Co.*, 108 Mo. 364, 18 S. W. 977.

Where there was evidence showing it was customary to step between the cars to uncouple them, and the chances were about as good between the cars and the rails as on the outside; that one could not always stand on the outside, and draw the pin; that, when plaintiff went to pull the pin, it stuck, and he went between the cars to pull it,—held, that he was not, as matter of law, negligent. *Hannah v. Railroad Co.*, 154 Mass. 529, 28 N. E. 682.

As to whether it is negligence not to use coupling sticks when provided and prescribed by the rules, and when the use of such may be excused, see note to chapter on rules.

Where there is evidence that a brakeman could easily and more safely have effected an uncoupling before the engine started, or after it stopped, the jury should be specifically instructed that they should consider this fact in connection with the condition of the track, the absence of runboards, and all other circumstances throwing light on the question, in determining whether or not the brakeman was guilty of contributory negligence. *Pleart v. Railway Co.*, 82 Iowa, 148, 47 N. W. 1017.

### **Contributory Negligence — Negligence of Defendant and Fellow Servant.**

Where the accident was occasioned by a defective wheel and brake, the employé can recover notwithstanding the negligence of the engineer or brakeman may have contributed to the accident. *St. Louis & S. F. Ry. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789.

Contributory negligence, to defeat a right of action, must be that of the party injured. *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Keegan v. Railroad Co.*, 8 N. Y. 175; *C. & N. W. R. Co. v. Swett*, 45 Ill. 197; *Gray v. Railroad Co.*, 24 Fed. 168; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 505.

In *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, it is said: "If the negligence of the company had a share in producing the injury, the company is liable, even though the negligence of a fellow servant contributed thereto. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident; and it is no defense that another was likewise guilty of wrong."

In *Stetler v. Railway Co.*, 46 Wis. 510, 1 N. W. 112, it was said: "Where the negligence of a railroad company directly contributes to the injury of an employé, the company must be held liable, though it also appears that the negligence of a co-employé contributed to such injury; and the rule is universal that contributory negligence, to defeat an action, must be the negligence of the plaintiff, or of some other person for whose acts he is responsible." *Paulmier v. Railway Co.*, 34 N. J. Law, 151.

Employés working machinery with other employés are not co-employés in such sense as to relieve the master from responsibility for an injury, brought about by other employés, which happens through defective machinery. *McDade v. Railway Co.*, 5 Mackey, 144; *Rancier v. Railway Co.*, 32 Minn. 331, 20 N. W. 332; *Cone v. Railway Co.*, 81 N. Y. 207.

In *Ellis v. Railroad Co.*, 95 N. Y. 546, a brakeman was injured in a collision. Seeing that it was imminent, he stepped from the caboose to the next car, and, owing to a defect in the buffers, he was caught and injured. The court say: "Conceding that persons in charge of the other train were negligent or wrongdoers, still the primary cause of the injury was the negligence of the defendant itself; and it is not competent for it to say that it is absolved from the consequences of its wrongful act by what others did. It is enough, however, if the fault or omission merely contributed to produce the injury complained of, or if it failed to exercise the care of an ordinarily prudent person in supplying cars reasonably safe for the purpose for which they were required."

*Sheehan v. Railway Co.*, 91 N. Y. 332, and *Dana v. Same*, 92 N. Y. 639, illustrate the reasons for the rule, and the extent to which it

has been carried. The plaintiffs were injured in a collision. The negligence charged was the failure to give proper instructions to the conductor of a train, whereby it was not held until the approach of another train. The court say: "The defendant annulled its time-table, and made it imperative upon No. 337 to move in spite of pre-arranged right of No. 50, and not only admitted as to No. 50 the exceedingly proper and wise conditions on which alone No. 337 was permitted to obey, but failed to send any communication whatever to No. 50. The object should have been to have prevented No. 50 from running according to the time-table. To secure certainty in that respect, the defendant should have so communicated with its conductor and engineer that these servants would understand the object. It was not enough to tell Keifer to hold the train. The duty devolved upon the defendant, and its breach was not excused by showing that it would have been held if Keifer had performed his duty. [Keifer was the operator who received the order to hold 50, and told the conductor to hold No. 50 for No. 61, not for No. 337.] The rules of defendant did not require Keifer to submit the message received by him to the conductor or engineer of No. 50, nor a communication back from those persons that they had received and understood the orders. An omission of either circumstance was the act of the defendant, and, in the absence of other precautions, might properly be held to constitute negligence." In the opinion in either case nothing is said that would indicate that the decisions were placed upon the ground of the contributory negligence of Keifer, a fellow servant; yet, if he was such fellow servant, the rule was applicable. Rather, they place the decision upon the ground that the duty he was required to do and did perform was one for which the master was responsible as a duty pertaining to itself, and, as to it, Keifer occupied the place of master.

In *Lilly v. Railway Co.*, 107 N. Y. 566, 14 N. E. 503, it was held: "If plaintiff's injuries were caused through negligence of co-employees, yet, if he could have extricated himself from the peril to which their negligence exposed him, if the brake on the car had been in proper order, it may be found that the defective brake was the cause of the injury."

In *Whitwam v. Railroad Co.*, 58 Wis. 408, 17 N. W. 124, where the alleged negligence was the coupling of a car to an engine, where the drawbar of the engine was too short, and plaintiff was injured while in the attempt to uncouple, the court state that the act of at-

taching the car, and the order to attach it, were the acts of fellow servants, and do not seem to consider the facts alleged as calling for the application of the doctrine of the concurring negligence of master and fellow servant.

The doctrine is as strongly stated in *Elmer v. Locke*, 135 Mass. 575, as elsewhere. The facts were that the plaintiff was injured by the fall of a trestle defectively constructed; such fall being occasioned by the negligent act of those who had the management of a train, in permitting it to escape from their control. The trestle was on a spur leading to a stone quarry. The court says that such neglect would not be sufficient to excuse the defendant if he was in fact responsible for the defective construction of the trestle work. "It does not exonerate him from the consequences of failure in the performance of his duty, if such failure contributed to the injury, to show that if others, for whom he is not responsible, had performed their duty, the injury would not have occurred, or that it might have been avoided by care and vigilance on the part of those who were clearly the fellow servants of the plaintiff in the transaction."

*Lane v. Atlantic Works*, 111 Mass. 136, was not the case of a fellow servant, yet, from the nature of the circumstances, I have thought proper to refer to it here. The facts were that the defendants had left a truck, with a bar of iron upon it, standing in front of their works; that the iron was not fastened, but would easily roll off the truck; that a boy 12 years old called to two boys younger than himself to come over and see him move the truck, and, in attempting to move it, the iron was caused to roll off, injuring one of the boys. The court says: "In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated; not in the number of subsequent events and agencies which might arise." It was held that it was immaterial whether the act of the boy in moving the truck was mere negligence or a voluntary inter-



meddling. "It was an act which the jury have found the defendants ought to have apprehended and provided against."

**Contributory Negligence—Proximate Cause.**

The case of *Lilly v. Railway Co.*, 107 N. Y. 566, 14 N. E. 503, may be considered extreme on this question. The court frankly admit that it is on the border line. Plaintiff was a brakeman in defendant's employ, and was on duty at its depot in New York. An engine was moving down to take a car loaded with ashes, standing on one of the tracks. Plaintiff went to the rear of the car to get upon it for the purpose of attending to the brake, while a car coupler took his position at the front of the car to couple it to the engine. The car had no step to get upon it. Plaintiff was obliged to take hold of the brakerod, and put his foot on one of the bumpers. The engine came down so rapidly that the car coupler could not make the coupling. The force of the collision threw plaintiff from the car, he was pushed along by the brakebeam for about 200 feet, and then the car passed over him, causing the injury complained of. Plaintiff's evidence tended to show that the brake of the ash car was out of order, so that it could not hold the car, of which defect defendant had notice; that it was customary, when cars are standing on the track, to have their brakes set, for the purpose, among others, of preventing their being moved far, if struck in making up trains, collision from such a cause being of frequent occurrence; that if the brakes of this car had been in proper condition, and set tight, the car would not have moved from such a collision more than 5 or 10 feet. Plaintiff was nonsuited. Held (Earl and Finch, JJ., dissenting) that, conceding plaintiff was knocked off the car through the negligence of his co-employés, and was so placed in a dangerous position, yet, under the circumstances, it might have been found that he could have extricated himself without injury if the brakes had been in proper condition, and that the defect was the proximate cause of the injury; that, therefore, the question should have been submitted to the jury; that an accident of this nature might fairly and reasonably be apprehended as a possible result of the failure on the part of the defendant to keep the brakes in good condition; that the fact that no such accident had ever happened before was not conclusive in this respect, as it was not necessary to see in advance all the possibilities of danger which might result from such an omission, or to show that the exact counterpart of the accident had happened before.

Defendant proved that it was the duty of all employés, when the brakes of a car standing on the track were out of order, so that they could not be set, to chock the wheels, and claimed that the omission to do so in this case was the negligence of a co-employé, contributing to the injury. Held untenable; that the failure to have the brakes in order could, under the circumstances, be fairly alleged as the cause of the injury. The court say: "We do not think it can be said that the collision of the engine with the ash car was the proximate cause of the injury. Assuming that he was knocked off the car through the negligence of the engineer or of the co-employé of the plaintiff, by which the collision was caused, yet, under the facts in the case, we think it can be said that the result of the collision was to place the plaintiff in a dangerous position, from which position he might have extricated himself without injury if the brakes on the ash car had been in proper condition. He was not injured by being thrown from the ash car; on the contrary, if the car had been moved but a few feet after he fell upon the track, he would have sustained no injury whatever. \* \* \* The difficult point in the case, and the one in regard to which we have had considerable doubt, is whether, assuming there was a failure of the company to have proper brakes upon the car, that failure really bore such a relation to the happening of the accident as to render the company liable. Can it be said this accident (or one of such a nature) might fairly and reasonably be apprehended as a possible result of a failure on the part of the company to perform its duty as to the brakes, or was it of such a character that its occurrence would never have been reasonably anticipated, and that it therefore bore no fair and just connection with the bad condition of the brakes? After considerable reflection and some hesitation, we have come to the conclusion that we cannot say there was no such relation. It is a border case, and much might be said on the other side. \* \* \* Accidents are continually happening, the exact counterpart of which may not, to our knowledge, have happened before. That is not the test. If the accident is of such a nature that its occurrence may reasonably be apprehended from the failure to take the precaution in question, and if it did thus happen, then a relationship is established between such failure and the cause. Now, the direct and immediate cause of this accident was the car running over the plaintiff. Granted that he would not have been run over if he had not first been knocked off the car by the collision; that only proves that by the neglect of a co-employé he

was placed in a dangerous position, and, being thus placed, he was injured because the car was not supplied with a brake in good condition." To the claim of counsel that the brakes, even if in perfect order, might not have been set, and, if not, this accident would have occurred, the court say: "It appears that it is usual and customary for employes, and their duty, to set the brakes; that the presumption is that they did their duty in this respect."

After all the reasoning of the learned court, the logic thereof still remains,—that the company was bound to anticipate that its employes would negligently perform their duty. If the duty required of them was properly performed, then it is not questioned but that the accident and consequent injury would not have happened. With their neglect, there was a possibility that it might, but hardly a probability. And the same court held, in *Laffin v. Railway Co.*, 106 N. Y. 136, 12 N. E. 599, that in such case the company were not charged with the responsibility, on the ground that they ought to have anticipated it. Presumptions ought not to be applied with partiality, and when the court say that it will be presumed that the employes performed, or would perform, their duty, in setting brakes on the cars, ought it not to extend to the defendant the benefit of the same presumption,—that its engineers would also properly perform their duties? Was not the case more like those that come within the rule that where an appliance is reasonably safe when prudently used by his servants, exercising ordinary care, it meets the requirements of the master's duty, and that he is not required to anticipate that it will not be used in such manner?

In *Whitwam v. Railway Co.*, 58 Wis. 408, 17 N. W. 124, where the negligence charged was the coupling of the car to the engine with a short drawbar, the plaintiff was injured by reason of the drawbar being too short in his attempt to uncouple. The court there hold that the short drawbar, if defective, was not the proximate cause of the injury, but such proximate cause was the act of the conductor or other servant in having it attached, and giving the order to the plaintiff to detach it. The two cases are hardly consistent.

In *Bajus v. Railroad Co.*, 103 N. Y. 312, 8 N. E. 529, the court of appeals of New York also considered the question of proximate cause, in respect to the probability that, if other conditions existed, the accident would have been avoided. The claim made in this case was that a locomotive was out of repair, and for this reason could

not be reversed as quickly as if in proper condition. The defects claimed would simply reduce the power of the engine; and the court said that the responsibility of the company, in such case, was no greater than if they had furnished a new engine of the same power as the defective engine; that it was an accident which the defendant had no reason to anticipate, and hence it was not bound to have an engine there adequate to avert its consequences; that it would impose upon every railroad company very embarrassing, onerous, and unjust responsibilities if, in the case of accidents with moving trains, it was to be a subject of inquiry before a jury whether the particular accident might not have been avoided with an engine of greater or less power.

In *Waldhier v. Railway Co.*, 87 Mo. 37, the facts were that a switchman was injured, while attempting to make a coupling, by reason of his foot being caught in a defective frog. He knew the point of the frog was out of repair, but did not know that the plate was broken until his foot struck it. The court held, if the servant would not have been injured but for the broken plate, then that was the proximate cause of his injury, and action would lie against the company therefor, if the servant was not charged with such knowledge of its defect as to amount to an assumption of the risk.

The case of *Pease v. Railway Co.*, 61 Wis. 163, 20 N. W. 908, furnishes a very apt illustration of the doctrine. The facts were that a brakeman was underneath the platform to uncouple cars. This position was made necessary by the fact that the chain connecting the lever with the drawbar was broken. The injury was caused by the conductor ordering the engineer to go ahead; he not knowing of the plaintiff's perilous position. It was contended that the failure of the company to have the chain repaired was the proximate cause of the plaintiff's injury. The court held otherwise, and adopted the language of the trial court,—that it merely furnished an occasion for uncoupling the cars in another than the usual way, with the lever; but there was no risk of injury from uncoupling with the bar while the cars were standing still. They further state that the jury, in answer to a special question, found the precise act of negligence which occasioned the injury, to wit, the act of the conductor in signaling to go ahead without a signal from the brakeman. Certainly, then, it was the negligence in giving the signal, not the failure to repair the chains, which was the direct proximate cause of the injury. The acts are distinct and independent, having really no

connection with each other; the failure to repair being but remote, while the neglect to give the signal was proximate, within the meaning of the cases.

In *Crowley v. Railway Co.*, 65 Iowa, 658, 20 N. W. 467, and 22 N. W. 918, it was said that it could not be held, as matter of law, where an employé, in performance of his duties, slipped upon ice near the track, and thus came in contact with a train running at an immoderate rate of speed, that such rate of speed was not the proximate cause of the injury.

In *Winstanley v. Railway Co.*, 72 Wis. 375, 39 N. W. 856, it was held that an excess of two miles an hour over the lawful rate of speed was the proximate cause of plaintiff's injury, upon the distinct ground that the plaintiff would have passed safely over the crossing before the train would have arrived there. This court says: "There could scarcely be a cause more proximate to the accident."

The ruling of the court would seem to imply that this court was in accord with the New York courts, and against the courts of Massachusetts, Pennsylvania, Nebraska, Ohio, and also the supreme court of the United States, where the question of negligent delay in forwarding freight consumed by fire, or destroyed by other means, is involved,—the former holding that such delay is a proximate cause, upon the ground that otherwise the goods would not have been exposed to the particular danger which destroyed them; the latter holding a contrary view. The logic must be that if excess of speed brings the train to the scene of accident, involving a risk which otherwise might not have occurred, a delay in the train caused by a negligent act must be held to operate the same; and therefore we have established a rule, most serious in possible results, that any delay in the progress of a train, chargeable to neglect, from the time it starts on its course, is such actionable negligence as will charge the company with liability for injury received, when it may be presumed that but for such delay the person or property injured would not have been at the place of the accident.

It cannot be contended for a moment that conduct or acts causing delay have any connection with the fact of the person being at the particular place at the time. As the court very properly says in *Pease v. Railway Co.*, *supra*, it merely furnishes the occasion for the accident; nothing more. Then, again, how can it be said that the company could reasonably have foreseen that the injured person would have been more likely to have been at the particular place at

one time than another, or that the act was more likely to produce him or others harm?

If we apply the same reasoning to a plaintiff, then we have the rule that if, on his journey, he at some time drove at an immoderate rate of speed, so that he reached a crossing in advance of the time he otherwise would but for such act, and he comes in collision with a train running at proper speed and upon regular time, and is thereby injured, he is guilty of such negligence, contributing to his injury, as will prevent his recovery. It is safe to say that courts generally will not accept the doctrine of the Wisconsin court, especially when carried to the extreme, or applied to conditions similar to those existing in the case referred to.

In *Fowler v. Railway Co.*, 61 Wis. 159, 21 N. W. 40, the gravamen of the complaint was that the defendant furnished for yard purposes an ordinary engine, with a "goose neck" projection, and that, if they had used an engine specially constructed for and adapted to such use, he would not have been injured. The court says. "The projecting goose neck of the passenger engine was not the proximate cause of the injury. It was only the instrument that inflicted it. It is perfectly clear that the injury of the plaintiff was caused by the negligence of the engineer or his brakeman in running the engine upon him in the manner they did, without notice, signal, or warning."

**CHAPTER XXII.****INDEPENDENT CONTRACTORS.**

**One who employs an independent contractor is not liable for his or his servants' negligence, p. 467.**

**Exception to rule where ordinary mode of doing the work naturally causes injury, p. 467.**

**So, also, where incompetent contractor is selected, p. 468.**

**So, also, where employer dictates improper means or method, p. 468.**

**Doctrine of respondeat superior applies where employer retains control and direction of the work, p. 468.**

**Difficulty in application of the rules, p. 469.**

**Illustrations of existence of the relation, p. 470.**

**Employer's liability to servants of contractor, p. 471.**

**The rule as applied to railroads is perhaps more liberal in respect to the liability of the company, p. 472.**

**Supervision by company's engineer does not change the rule, p. 473.**

**Nor does retention of funds by employer to pay for possible injuries, p. 473.**

**Nor does retention of power to discharge workmen, p. 473.**

**Nor does the fact that the contractor is to follow specifications, p. 473.**

**Nor does the fact that the employer retains right to supervise or direct, p. 473.**

**Liability when railroad is being constructed and operated by contractor, p. 473.**

**Acts of servant not within scope of employment, p. 474.**

Where one person employs another to furnish the materials and do a specific job of work as an independent contractor, he does not thereby render himself liable for injuries caused by the sole negligence of such contractor or his servants.<sup>1</sup>

The relation of master and servant does not exist where the person employed is in the exercise of a distinct, independent employment, and not under the immediate control or direction of the employer.<sup>2</sup>

An exception to the general rule is that where the performance of such contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which causes the injury, then the em-

<sup>1</sup> Hackett v. W. U. Tel. Co., 80 Wis. 187, 49 N. W. 822; Hundhausen v. Bond, 36 Wis. 40; Whitney v. Clifford, 46 Wis. 146, 49 N. W. 835; Robbins v. Chicago, 4 Wall. 679; Hilliard v. Richardson, 3 Gray, 349; Conners v. Hennessey, 112 Mass. 96; Blake v. Ferris, 5 N. Y. 48; McCafferty v. Railroad Co., 61 N. Y. 178; Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755; Scammon v. Chicago, 25 Ill. 424; Pifan v. Williamson, 63 Ill. 16; Hale v. Johnson, 80 Ill. 185; Hughes v. Railway Co., 39 Ohio St. 461; Stone v. Cheshire R. Corp., 19 N. H. 427, 51 Am. Dec. 200, note.

<sup>2</sup> Pierce v. O'Keefe, 11 Wis. 181; De Forrest v. Wright, 2 Gibbs, 368; Ohio South. R. Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; Hughes v. Railroad Co., 39 Ohio St. 476; McCarthy v. Second Parish, 71 Me. 318; Aston v. Nolan, 63 Cal. 269; Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296; Waltemeyer v. Railway Co., 71 Iowa, 626, 33 N. W. 140; Sweeney v. Railroad, 128 Mass. 5; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581; Deford v. State, 30 Md. 179; Speed v. Railway Co., 71 Mo. 303.



ployer is subject to the same liability to the injured party as the contractor.<sup>3</sup>

The general rule is subject to the qualification that the employer cannot knowingly select an incompetent contractor, and then escape liability for injuries occasioned by reason of the incompetency of such contractor;<sup>4</sup> and also that the owner cannot dictate that his structures or other appliances shall be constructed of improper materials, or upon a defective or unsafe plan, and escape liability for injuries caused thereby because he made a contract with third person to construct it; nor can he, with knowledge of a weakness or defect threatening its strength, or rendering it a dangerous place, direct men to work in or near it, and, in case of injury from such defects, shift all responsibility upon the contractor.<sup>5</sup> The latter proposition of the exception is but an application of the familiar rule that the master must exercise reasonable care to provide a safe place for his servant to perform his work.

The principle of respondeat superior is confined in its application to the relation of master and servant, and principal and agent. Where, however, the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor or his servants or agents, the employer is then placed under a liability equal and similar to that which exists in the ordinary case of principal and agent.<sup>6</sup>

<sup>3</sup> *Chicago v. Robbins*, 2 Black, 418; also cases just cited.

<sup>4</sup> *Robbins v. Chicago*, 4 Wall. 657; *Homan v. Stanley*, 66 Pa. St. 464.

<sup>5</sup> *Meler v. Morgan*, 82 Wis. 294, 52 N. W. 174; *Whitney v. Clifford*, 46 Wis. 138, 49 N. W. 835; *Trainor v. Railroad Co.*, 137 Pa. St. 148, 20 Atl. 632.

<sup>6</sup> *City of Cincinnati v. Stone*, 5 Ohio St. 40.

It was said in *Pierce v. O'Keefe*:<sup>7</sup> "The question how far a party is liable for the negligence or torts of any person employed by him, while executing or attempting to execute the duties of that employment, has of late undergone much discussion, both in this country and in England; and although there have been some cases which have stated the law upon this subject in terms so general and loose that it would hold a party responsible for the torts, negligence, or unskillfulness of any other whom he had employed, in no matter what capacity, while executing the employment, yet the later cases are discriminating much more closely, and are defining this liability in such manner as to place it upon a much narrower, as well as more rational, basis. The case of *Hilliard v. Richardson*<sup>8</sup> contains an elaborate review of the authorities on the subject, and we consider the comments and conclusions of the court just and reasonable.

\* \* \* The general result seems to be that such a liability arises only where there is a direct relation of master and servant; where the injury arises from something that amounts to a nuisance established upon the defendant's land; or where it occurs in the execution of a work under public authority, when the law will not permit those to whom the power is delegated to evade the responsibilities imposed, by employing others, even though they do so in such manner that the direct relation of master and servant does not exist."

It is not always easy to determine, by the application of the foregoing rules, when one is an independent contractor, whether the employer remains or becomes responsible for injuries occasioned to the employes of such contractor from the negligence of the contractor himself, or other servants in his employ, or whether such servants of a contractor, or

<sup>7</sup> 11 Wis. 181.

<sup>8</sup> 3 Gray, 349.

some of them, are fellow servants of servants, in the direct and immediate employment of the principal.

Like most other branches of the general subject, there are many exceptions to the general rule. There is much confusion in the authorities, and much depends on the exact conditions of the employment and particular circumstances attending the case. The mere fact that one works by the piece or job, and not by the day or week, is not a conclusive test of the character of the employe, whether a servant or independent contractor.<sup>9</sup>

It was held in *Mansfield Coal Co. v. McEnery*<sup>10</sup> that a competent and experienced bridge builder, who was employed by the company to superintend the construction of a bridge for a railway company, though paid by the day, was an independent contractor in such sense that the company was not responsible for defects in its construction owing to his negligence; the court comparing his relation to the company to that of one from whom it might purchase a locomotive. This case, as we have stated before, is an extreme one.

It was held that one who contracts with a furnace company to take sand from its land, and to deliver it at its furnace, at a stipulated price per load, was an independent contractor.<sup>11</sup> Yet it was held that an employe of a fuel company, engaged in delivering coal for the company at a stipulated price per load, was a servant of the company, and not an independent contractor;<sup>12</sup> and also that a person operating a shingle machine, to manufacture shingles by the thousand for the owners of a mill, was an independent con-

<sup>9</sup> *Corbin v. American Mills*, 27 Conn. 274; *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61.

<sup>10</sup> 91 Pa. St. 191.

<sup>11</sup> *Fink v. Missouri Furnace Co.*, 82 Mo. 276.

<sup>12</sup> *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52.

tractor, and not an employé, for whose acts the owners were liable.<sup>13</sup>

The rule was carried in New York to the extent of holding that one engaged in the roofing business, who was employed to repair a defect in the roof of a building, the entire method and manner being left to him, was an independent contractor, and the employer was not liable for an injury occasioned to one by the negligent manner in which the employés of such contractor placed and operated their appliances in doing the work; that it was immaterial that the work was charged for by the day.<sup>14</sup> So, in California, it was held that a plumber employed to repair water pipes in his own way was an independent contractor.<sup>15</sup>

Where a person was employed by a railroad company to furnish and superintend a steam engine for pumping water, he was held by the supreme court of Indiana to be an independent contractor.<sup>16</sup> Yet the supreme court of Missouri held that a person who made a contract with a railroad company whereby he was to have entire charge, in defendant's yard, of the work of making up trains, and to be paid a certain sum per ton of freight and for each car hauled from the yard, was a mere servant of the company, and not an independent contractor.<sup>17</sup>

Where, by the terms of the contract, the principal is under obligation to the contractor to furnish the necessary machinery and appliances, or to supply a portion of the labor, he is liable to the agent or servant of the contractor for an

<sup>13</sup> State v. Emerson, 72 Me. 455.

<sup>14</sup> Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, and 54 Am. Rep. 703.

<sup>15</sup> Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329.

<sup>16</sup> Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296.

<sup>17</sup> Speed v. Railway Co., 71 Mo. 303.

injury sustained by reason of his neglect to use due and reasonable care in selecting and keeping in repair the proper machinery or appliances, or in employing and retaining incompetent servants.<sup>18</sup>

If, however, a person sustains injury by the negligent use of the means and appliances furnished the contractor by the principal, when such contractor is, by the contract, to direct and prescribe their use, the principal is not liable.<sup>19</sup>

It has been said that no liability attaches where the employer simply reserves the right to prescribe what shall be done, but not how it shall be done, or who shall do it.<sup>20</sup> Yet, where the employer reserves to himself arrangements for the protection of workmen, he will be liable for such injuries as happen to employés of the contractor without their fault.<sup>21</sup>

As applied to railroads, the rule is perhaps more liberal in respect to the liability of the company. In the construction of railroads, especially, the company necessarily must, to some extent, retain supervision over the general design of the work. It is therefore quite generally held that the company is not liable for the negligent acts of a contractor or his servants, when the contractor has independent control over the work and the men employed; that is, over the mode and manner of doing the work.<sup>22</sup>

In some cases it is denied that there is any difference in

<sup>18</sup> Latham v. Roach, 72 Ill. 179; Malone v. Hawley, 46 Cal. 409; Pierce v. Whitcomb, 48 Vt. 127; Samuelson v. Mining Co., 49 Mich. 164, 13 N. W. 499.

<sup>19</sup> Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296; McCafferty v. Railroad Co., 61 N. Y. 178; Reed v. Allegheny City, 79 Pa. St. 300.

<sup>20</sup> Allen v. Williard, 57 Pa. St. 374; Schwartz v. Gilmore, 45 Ill. 455.

<sup>21</sup> Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

<sup>22</sup> Edmundson v. Railroad Co., 111 Pa. St. 316, 2 Atl. 404; Hughes v. Railroad Co., 39 Ohio St. 461; Redf. R. R. 537.

the application of the rule between individuals and railway corporations.<sup>23</sup> In *Edmundson v. Railroad Co.* it was held that a contractor who employs his own means, and pays his own workmen, in building a railroad, is, as to third persons, independent of the company, although the company's engineer has a general supervision in respect of the time of doing the work.

The mere fact that, by the terms of the contract, it is stipulated that the contractor is liable to the company for all negligent acts, and that the company may retain from his compensation a sum sufficient to make amends for all injury done, will not make the company liable; nor does such provision inure to the benefit of outside persons injured by the negligence of the contractor.<sup>24</sup>

In New Jersey it was held that the fact that the company retained the power to discharge incompetent workmen did not change the relation of the contractor to that of a servant, or render it liable for the contractor's negligence.<sup>25</sup>

The fact that the contractor is working in accordance with specifications does not change the independent character of the employment;<sup>26</sup> nor does the fact that the company retains the right to supervise generally,<sup>27</sup> or give general directions.<sup>28</sup>

While the road is being constructed, and is in the possession of and being operated by a contractor, the company is

<sup>23</sup> *Edmundson v. Railroad Co.*, 111 Pa. St. 316, 2 Atl. 404; *Hughes v. Railroad Co.*, 39 Ohio St. 461.

<sup>24</sup> *Tibbetts v. Railway Co.*, 62 Me. 437.

<sup>25</sup> *Cuff v. Newark, etc., R. Co.*, 35 N. J. Law, 17; *Reedie v. London, etc., Ry. Co.*, 4 Exch. 244; *Hobbit v. Same*, Id. 254.

<sup>26</sup> *Hunt v. Railroad Co.*, 51 Pa. St. 475; *St. Louis, Ft. S. & W. R. Co. v. Willis*, 38 Kan. 330, 16 Pac. 728.

<sup>27</sup> *Eaton v. Railway Co.*, 59 Me. 520.

<sup>28</sup> *Schular v. Railroad Co.*, 38 Barb. 653; *Callahan v. Railroad Co.*, 23 Iowa, 562.

not liable for injuries caused by the contractor or his servants in the operation thereof.<sup>29</sup> And the fact that the company furnishes the motive power to be used in such construction, under the direction and control of the contractor, will not make it liable for injuries occasioned by those directing or in charge of such appliances.<sup>30</sup>

It was, however, held, in a recent case in Illinois, that a contractor who had a contract for changing the gauge of a railroad was, as to the company, in doing such work, a servant.<sup>31</sup>

A master is not responsible for the wrongful act of his servant, unless that act be done in the execution of the authority of the master, express or implied. Beyond the scope of his employment, the servant is as much a stranger to the master as any third person; and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master.<sup>32</sup>

<sup>29</sup> *Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kan. 34; *Burke v. Railroad Co.*, 34 Conn. 474; *Painter v. Mayor, etc., of Pittsburgh*, 46 Pa. St. 213; *West v. Railroad Co.*, 63 Ill. 545; *Slater v. Mersereau*, 64 N. Y. 138.

<sup>30</sup> *Miller v. Railway Co.*, 76 Iowa, 655, 39 N. W. 188; *Hitte v. Railroad Co.*, 19 Neb. 620, 28 N. W. 284; *West v. Railroad Co.*, 63 Ill. 545; *Slater v. Mersereau*, 64 N. Y. 138.

<sup>31</sup> *Toledo, St. L. & K. C. R. Co. v. Conroy*, 39 Ill. App. 351; *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321, 956; *Piette v. Bavarian Brewing Co.*, 91 Mich. 605, 52 N. W. 152; *Bibb's Adm'r v. Railroad Co.*, 87 Va. 711, 14 S. E. 163; *Fulton Co. St. R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *Geer v. Darrow*, 61 Conn. 220, 23 Atl. 1087.

<sup>32</sup> *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

**CHAPTER XXIII.****CONTRACTS LIMITING LIABILITY.**

**As to validity of contracts exempting common carriers from liability the courts are not in harmony, p. 475.**

**Exempting railroad companies generally, p. 476.**

**Exempting masters generally from liability to servants, p. 477.**

**Statutes declaring such contracts void, p. 477.**

**The common-law rule, p. 478.**

**Effect of common law on statutes, p. 478.**

**The question of public policy, p. 478.**

**The question of consideration for contract, p. 481.**

**Parent cannot exempt minor's employer, p. 481.**

The courts are not in harmony upon the question of the validity of contracts exempting common carriers, as such, from liability for injury or loss occasioned by the negligence of their agents or servants. In England, Canada, New York, New Jersey, Connecticut, and West Virginia the courts have held that a railway company may, upon proper consideration, lawfully contract to relieve itself from the consequences of any and all negligence on the part of its servants, employés, and agents, without regard to the degree of such negligence, and that such contracts are not against public policy.<sup>1</sup>

<sup>1</sup> *McCawley v. Railroad Co.*, L. R. 8 Q. B. 57; *Hall v. Northeastern R. Co.*, L. R. 10 Q. B. 437; *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178; *Alexander v. Railroad Co.*, 3 Strob. 594; *Wells v. Railroad Co.*, 26 Barb. 641, 24 N. Y. 181; *Perkins v. Railroad Co.*, Id.



There is another class of cases which hold that it is against public policy to allow a common carrier to contract to exempt itself from liability on account of the negligence either of the corporation itself or of its agents, servants, or employes, without regard to the degree of such negligence or carelessness.<sup>2</sup> In most of the cases cited it will be found that the doctrine was applied to the carriage of goods for hire, or passengers for a consideration.

In Pennsylvania, Alabama, Indiana, Minnesota, Maine, Arkansas, Kansas, and Virginia it would seem that the courts have adopted the broad rule stated, without the limitation last mentioned.<sup>3</sup>

There is still another class of cases which hold that, in the case of passengers who are carried gratuitously by the common carrier, the carrier may, by express contract, re-

221; *Bissell v. Railroad Co.*, 25 N. Y. 442; *Magnin v. Dinsmore*, 56 N. Y. 168; *Kinney v. Railroad Co.*, 32 N. J. Law, 407, 34 N. J. Law, 513; *Griswold v. Railroad Co.*, 53 Conn. 371, 4 Atl. 261; *Skeels v. Baltimore & O. R. Co.*, 3 W. Va. 556.

<sup>2</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railway Co. v. Stevens*, 95 U. S. 655; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468; *New World v. King*, 16 How. 469; *Perry v. Railway Co.*, 44 Ark. 383; *Kansas P. Ry. Co. v. Peavey*, 29 Kan. 169; *Memphis & C. Ry. Co. v. Jones*, 2 Head, 517; *Lake Shore & M. S. Ry. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467; *Willis v. Railway Co.*, 62 Me. 488; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Johnson's Adm'x v. Railroad Co.*, 86 Va. 975, 11 S. E. 829; *Hissong v. Railroad Co.*, 91 Ala. 514, 8 South. 776; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276; *State v. Western M. R. Co.*, 63 Md. 433.

<sup>3</sup> *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; *Jacobus v. Railroad Co.*, 20 Minn. 125 (Gil. 110); *Willis v. Railway Co.*, 62 Me. 488; *Kansas P. Ry. Co. v. Peavey*, 29 Kan. 169; *Perry v. Railway Co.*, 44 Ark. 383; *Johnson's Adm'x v. Railroad Co.*, 86 Va. 975, 11 S. E. 829; *Hissong v. Railroad Co.*, 91 Ala. 514, 8 South. 776.

lieve himself from the consequences of the mere neglect or want of ordinary care on the part of the carrier or his servants and employés, but he cannot relieve himself from liability for gross negligence on his part, or on the part of his servants or employés.<sup>4</sup>

Says the supreme court of Wisconsin: "It does not appear to us to be contrary to public policy, or to good morals, for the carrier to stipulate with the person who desires a gratuitous transportation that he shall assume the ordinary risks of accident which may occur through the want of ordinary care on the part of the servants of the company. So long as the carrier does not attempt to excuse himself from that recklessness of his servants which is dangerous to human life, or is punishable by law, or inconsistent with good morals, it does not seem to us that he is violating any rule of law, or that he is acting against public policy."<sup>5</sup>

The courts of Ohio, Alabama, Virginia, and Kansas have held that contracts between the master and his servant, whereby the master is relieved from liability to the servant for injuries received in the service by the neglect of the master or other servants, are against public policy, and therefore void;<sup>6</sup> while in Georgia and New York such contracts, based upon a valid consideration, are upheld.

In many of the states, statutes have been enacted whereby such contracts are declared to be inoperative, and not

<sup>4</sup> Illinois Cent. R. Co. v. Read, 37 Ill. 484; Same v. Morrison, 19 Ill. 136; Annas v. Railroad Co., 67 Wis. 46, 30 N. W. 282. See, also, Com. v. Vermont & M. R. Co., 108 Mass. 7.

<sup>5</sup> Annas v. Railroad Co., 67 Wis. 59, 30 N. W. 282.

<sup>6</sup> Lake Shore & M. S. Ry. Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467; Johnson's Adm'r v. Railroad Co., 86 Va. 975, 11 S. E. 829; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360; Hissong v. Railroad Co., 91 Ala. 514, 8 South. 776; Kansas P. Ry. Co. v. Peavey, 29 Kan. 169.

available as a defense. The common law, as declared by their courts, has in several states been radically changed by the enactment of special statutes. These statutes, generally, are limited in their application to railroad corporations. Under the common law, certain risks, including the negligence of fellow servants, were impliedly assumed in the ordinary contract of employment. By force of the statute, such risks are not thus impliedly assumed. The question may arise whether such statutes can have the additional force of making express contracts whereby the servant expressly, and in direct terms, assumes the risks which at common law he impliedly assumed, void upon the grounds of public policy.

When a contract is declared void as against public policy, it is so declared, not in the interest of either of the parties, but in the interest of the public. "The defense is allowed, not for the sake of the defendant, but for the sake of the law itself."<sup>7</sup>

"It must not be forgotten," says Sir G. Jessel, M. R., in *Printing & Numerical Registering Co. v. Sampson*,<sup>8</sup> "that you are not to extend, arbitrarily, those rules which say that a given contract is void as being against public policy; because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred. Therefore, you have this paramount public policy to consider: that you are not lightly to interfere with this freedom of contract."

Courts, in giving to such statutes the force of prohibiting the assumption of those risks by express terms in a contract

<sup>7</sup> *Oscanyan v. Arms Co.*, 103 U. S. 268.

<sup>8</sup> L. R. 19 Eq. 462-465.

which were impliedly assumed at common law by the ordinary contract of service, upon the ground that such contracts are against public policy, must, in effect, declare that the common law was against public policy. Yet, notwithstanding this effect, the supreme court of Alabama<sup>9</sup> declared that a provision in a contract between a railroad company and a switchman, whereby the regular wages paid the latter were to cover all risks and liability to accident from every cause, and right to damages, was not to be recognized; that it was against public policy, and void. This was stated with reference to a provision of a statute which made an employer liable to an employé for personal injuries resulting from the negligence of any person in the employer's service who had charge or control of any engine or car or train upon a railway. It might be said to be against public policy to permit the employer to thus stipulate against the consequences of his own personal negligence, or the negligence of those who were in the performance of duties personal to the master; but it is not easy to perceive how or in what manner the rights or interests of the public would be injuriously affected by reason of such a stipulation as to the conduct of his other servants.

The consideration which influenced courts to declare such contracts inoperative in cases of carriage for hire was that the carrier might thus be influenced to exercise less vigilance and caution, whereby the hazards to the public might be increased; that the public interests and welfare might thus be injuriously affected. This consideration is not involved in the relation existing between the master and his servant. The master was liable at common law for any want of ordinary care in the selection or retention of incompetent servants, whereby injury was occasioned to other

<sup>9</sup> *Hissong v. Railroad Co.*, 91 Ala. 514, 8 South. 776.

servants in the same common employment; so it cannot be said that he would be less vigilant and cautious in this respect by reason of the stipulation in the contract. In fact, most courts expressly place the doctrine of fellow servant upon the ground of public policy, and say, with reason, that when servants have no recourse against the common master for injuries to one by the neglect of another, it operates as an incentive to greater care and vigilance by the servants in looking out for the safety of themselves and their fellows, which necessarily results in securing to the public greater safety and greater security from risks and loss. It is perfectly obvious that whatever stimulates employes as servants of one engaged as a common carrier to increased attention to duty, and to the exercise of care and skill in their calling, in providing for their own safety, renders such service more safe for the public. Therefore, if public policy is at all contravened by the provisions of such statutes amendatory of the common law, it is in this: that they tend to increase the dangers and risks to the public.

The legislature of a state cannot, by the enactment of a statute, prohibit persons capable of contracting from making contracts to their mutual advantage and benefit, when no public right or interest is affected; nor can they intrude upon the functions of the judicial branch of our system of government by declaring such contracts inoperative, or that they shall not be upheld by the courts, when fairly made. An act cannot be made against public policy by a simple declaration that it is so. It must be so in fact; that is, it must in some manner contravene public right or the public welfare.

While, as we contend, the Alabama court was inconsistent in holding the contract void in the case stated, yet it may be said that the Ohio court was entirely consistent in so holding a similar contract void. The common law in the

latter state had not been changed or affected by legislation. The common law therein was the result of public policy. Any contract, therefore, in effect evading the responsibilities placed upon the master by the common law would be against public policy.

Where it is sought to include in such contract risks not impliedly assumed in the contract of employment, the additional risks must be based upon an adequate consideration. Where such contract is signed while the servant is in the defendant's employ, and no new consideration is made, or provision to continue the servant in the employment, it is void for lack of consideration.<sup>10</sup>

The Georgia court holds that the servant may, in the contract of service, assume all risks appertaining to the service, including the negligence of the master, yet such risks as arise from criminal negligence of the master or his servants are to be excepted from the general rule upon the subject.<sup>11</sup>

A paper signed by a brakeman, recognizing the rule of the company forbidding the coupling of cars without a stick, and waiving all liability of the company for any results of disobedience of such rule, is not to be construed as a contract by the company exempting itself from liability for its own negligence.<sup>12</sup>

A parent, or one standing in loco parentis to a minor, cannot contract so as to exempt the latter's employer from responsibility to the minor for permanent injuries inflicted upon him.<sup>13</sup>

<sup>10</sup> Purdy v. Railroad Co., 125 N. Y. 209, 26 N. E. 255.

<sup>11</sup> Western & A. R. Co. v. Bishop, 50 Ga. 465; Fulton Bag & Cotton Mills v. Wilson, 89 Ga. 318, 15 S. E. 322.

<sup>12</sup> Russell v. Railroad Co., 47 Fed. 204.

<sup>13</sup> International & G. N. Ry. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681.

## CHAPTER XXIV.

### CONTRACTS RELEASING CLAIMS.

**General rule is that they are valid, p. 482.**

**May be impeached for fraud or misrepresentation, p. 482.**

**Effect of mistake or ignorance of employe, p. 482.**

**Rules applicable to other contracts apply, p. 482.**

**The doctrine as stated in the several states, p. 483.**

**May be impeached in courts of law, p. 486.**

**Return of consideration not a condition precedent to impeachment, p. 486.**

**Release obtained, without knowledge of counsel, after action commenced, p. 487.**

Contracts between the master and servant, whereby the servant accepts a stipulated sum or other valuable consideration as compensation for the injury, and thereby releases the employer from all claim for damages, are, in general, valid and binding upon the servant. Such contracts may, however, be impeached for fraud or misrepresentation on the part of the employer in procuring them from the servant.<sup>1</sup> And in some cases it has been held, if a party did not fully understand the contents of a contract or release at the time he signed the same, upon that fact being made to appear he will not be bound by its terms.<sup>2</sup>

It cannot, however, be said, upon principle, that any other or different rule should be applied in determining the va-

<sup>1</sup> Illinois Cent. R. Co. v. Welch, 52 Ill. 183.

<sup>2</sup> Shultz v. Railway Co., 44 Wis. 638; Butler v. Regents of State University, 32 Wis. 124; Chicago, etc., R. Co. v. Doyle, 18 Kan. 58.

lidity of such contracts, or the capacity of the contracting parties, than would be applied to ordinary contracts, or the capacity of the parties thereto. Mental incapacity on the part of one of the contracting parties to a contract may always be urged against its enforcement, without regard to the particular cause that may have induced it.

Contracts, however, should not be evaded upon the mere pretext alone that the party seeking to avoid its provisions did not understand it, especially when the language is plain, certain, and expressive; otherwise, such contracts, either as agreements or as evidence thereof, may become valueless, or of no import, other than as throwing the burden of proof upon the opposite party. The door for the commission of perjury would be thus thrown open; and, the guilty party being secure from punishment by the very nature of the transaction, it would seem that justice and reason demand, in such cases, at least that the person asking release from his agreement should present some convincing cause, not in law attributable to his own neglect, but which was produced by the conduct of the other party, amounting to an imposition upon his rights, by means of which he was induced to sign and execute the agreement, before he should be permitted to impeach or avoid it. Any other rule, as has been said, would render unavailing contracts of compromise.

The recent case of *Albrecht v. Milwaukee & S. Ry. Co.*<sup>3</sup> fully sustains the views we have stated, and explains, if it does not qualify, what was said by the same court in earlier cases.<sup>4</sup> It was there said, with reference to an instruction of the circuit court that an employé might avoid the binding effect of a release by merely showing that at

<sup>3</sup> (Wis.) 58 N. W. 72.

<sup>4</sup> *Shultz v. Railway Co.*, 44 Wis. 638; *Butler v. Regents of State University*, 32 Wis. 124; *Sheanon v. Insurance Co.*, 83 Wis. 527, 53 N. W. 878.



the time he signed it he did not know its contents or effect, that "written instruments, regularly executed and delivered, cannot be thus dealt with and avoided, and their operation defeated." The following statement in the opinion of the supreme court of the United States<sup>5</sup> was approved: "It cannot be tolerated that a man shall execute a written instrument, and, when called upon to abide by its terms, say, merely, that he did not read it or know what it contained."

The doctrine of the Wisconsin court is—and it is sustained by respectable authority—that the employé or party, as the case may be, may avoid the terms of his contract if it was signed through his excusable mistake or negligence; the burden of proof being upon him to rebut the presumption of gross negligence. Mere neglect on his part to read the contract, in the absence of fraud, misrepresentation, or undue influence on the part of the other party, is not such negligence as may be excused. Neither is his inability to read English, or understand the contents of the paper, an excuse. "He could and should," say that court, "seek the assistance of some one capable of properly informing him. Not to do so is gross negligence."<sup>6</sup>

The supreme court of Iowa is in accord with the Wisconsin court to the extent that "where a party had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but he chose to rely upon what another said about it, he is estopped by his own negligence from claiming that it is not legal and binding upon him according to its terms."<sup>7</sup>

<sup>5</sup> Upton v. Tribilcock, 91 U. S. 50.

<sup>6</sup> Albrecht v. Milwaukee & S. Ry. Co. (Wis.) 58 N. W. 72; Fuller v. Insurance Co., 36 Wis. 603; Sanger v. Dun, 47 Wis. 615, 3 N. W. 388; Sheanon v. Insurance Co., 83 Wis. 527, 53 N. W. 878.

<sup>7</sup> Wallace v. Railway Co., 67 Iowa, 547, 25 N. W. 772; Bell v.

For other illustrations of the doctrine in other states, see cases cited in footnote.<sup>8</sup>

It was held by the supreme court of Kansas that when a servant, at the time of executing such a contract, was so much under the influence of drugs and opiates, taken to alleviate his pains caused by a broken thigh, as to be mentally incapacitated to contract, such a release was voidable, and not a defense to his cause of action; that in such case it was not necessary for him to pay back, or offer to pay back, the money received at the time of signing such paper, as a condition precedent to his right to sue on his claim for damages; that the jury had the right to give the master credit for the money paid at the time the release was signed.<sup>9</sup>

The supreme court of Wisconsin<sup>10</sup> held that the plaintiff's ignorance of the contents of a release under seal, signed by him, was excused, when the circumstances were that he was, at the time of signing it, sick in bed from the effects of his injuries, and was unable, by reason of dizziness, to read it, and the subject of a release for the injuries was not talked of, nor understood by the plaintiff or the agent of the defendant to cover such injuries; it being understood that the release covered merely the loss of the plaintiff's property by the accident. It was urged that, notwithstanding the facts recited, the release was still binding upon the plaintiff;

Byerson, 11 Iowa, 233; McCormack v. Molburg, 43 Iowa, 561; McKinney v. Herrick, 66 Iowa, 414, 23 N. W. 767.

<sup>8</sup> Squires v. Amherst, 145 Mass. 192, 13 N. E. 609; Brown v. Cambridge, 3 Allen, 474; Pratt v. Castle, 91 Mich. 484, 487, 52 N. W. 52; Cummings v. Baars, 36 Minn. 350, 31 N. W. 449; Fuller v. Bulce, 80 Ga. 395, 6 S. E. 17; Wheaton v. Fay, 62 N. Y. 275; Germania F. Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90.

<sup>9</sup> Chicago, etc., R. Co. v. Doyle, 18 Kan. 58.

<sup>10</sup> Lusted v. Railway Co., 71 Wis. 391, 36 N. W. 857.

that it could only be avoided on the ground of fraud in procuring it to be executed. The court held: "Courts relieve against mistakes, as well as fraud, in written instruments. When there is a material mistake in the written instrument, either through the error of the draughtsman in reducing the agreement to writing, or by the omission or insertion of a stipulation contrary to the intention of the parties, courts relieve against and correct the mistake." This language must be taken with the qualification that the mistake or ignorance must not be attributable to the negligence of the party seeking to avoid it.

It has often been urged that releases executed under such circumstances, or circumstances somewhat similar, could only be impeached in a court of equity. Yet the courts quite generally hold that they may be investigated and barred as a defense in an action at law.<sup>11</sup>

The Wisconsin court agrees with the supreme court of Kansas that a return of the consideration paid is not a condition precedent to the commencement and prosecution of the action; that it may be deducted by the jury from the amount of the damages.<sup>12</sup> This proposition is in conflict with the rule as declared in many states.<sup>13</sup>

The courts jealously guard the rights of parties to such contracts, and scrutinize very closely the conduct of the par-

<sup>11</sup> *Busslan v. Railway Co.*, 56 Wis. 333, 14 N. W. 452; *Lusted v. Railway Co.*, 71 Wis. 391, 36 N. W. 857; *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58; *Wallace v. Railway Co.*, 67 Iowa, 547, 25 N. W. 772.

<sup>12</sup> *Sheanon v. Insurance Co.*, 83 Wis. 527, 53 N. W. 878.

<sup>13</sup> *Kreuzen v. Railroad Co.* (City Ct. N. Y.) 13 N. Y. Supp. 588; *Gould v. Bank*, 86 N. Y. 75; *International & G. N. Ry. Co. v. Brazzil*, 78 Tex. 314, 14 S. W. 609; *Norwich Union Fire Ins. Soc. v. Girton*, 124 Ind. 217, 24 N. E. 984; *Pangborn v. Insurance Co.*, 67 Mich. 683, 35 N. W. 814.

ties in proceedings where the terms of the contract are urged as a defense. The party must not be unduly influenced against his interests, and the transaction must be free from fraud or misrepresentation.

It was said by the supreme court of Wisconsin:<sup>14</sup> "We think that no release obtained from the plaintiff, after an action has been commenced and counsel employed, in the absence of plaintiff's counsel, and without his consent or knowledge, should bind the party, unless the utmost good faith is shown on the part of the defendant in obtaining the same. When a party has employed an attorney to prosecute an action, such attorney ought to be consulted if a compromise of such action is sought; and, ordinarily, it would be an act of bad faith on the part of the client and the opposite party to compromise the action without the consent of, or without consulting, such attorney."<sup>15</sup>

<sup>14</sup> *Bussian v. Railway Co.*, 56 Wis. 335, 14 N. W. 452.

<sup>15</sup> *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82; *Eagle Packet Co. v. Defries*, 94 Ill. 598; *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58.

**CHAPTER XXV.****LAW GOVERNING RIGHTS AND REMEDY.**

**General rule, p. 488.**

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**Decision, only, can be read, not dissenting opinion, p. 488.**

**Proof of foreign law, p. 488.**

**Construction of foreign law, p. 489.**

When an action is brought in one state to recover for a personal injury suffered in another state, the law of the latter governs as to the rights of the litigants, and the former as to the remedy.

When the authoritatively published decisions of another state are in evidence in a given case, the question of what those decisions decide is one of law for the court, and not one of fact for the jury.

Nothing but the decision can be read. A dissenting opinion is not a decision. Where the written law of a foreign state is before the court, parol evidence as to its contents or its construction is ordinarily admissible.<sup>1</sup>

The common law of a foreign state may be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. As a general rule, the decisions of courts of justice are the evidence of what is common law.<sup>2</sup>

<sup>1</sup> Chicago & N. W. Ry. Co. v. Tuite, 44 Ill. App. 535; Hooper v. Moore, 40 N. C. 130; Chicago & N. W. Ry. Co. v. Johnson, 27 Ill. App. 351.

<sup>2</sup> McDeed v. McDeed, 67 Ill. 546.

The principle that the best testimony which the nature of the case admits of shall be required applies to foreign laws.<sup>3</sup>

When it is shown by the witnesses themselves that the knowledge they are testifying to is derived from the identical reported decisions in evidence in the case, their construction of what the law is, as announced by those decisions, becomes immaterial. The decisions themselves are the best evidence of what they contain.<sup>4</sup>

<sup>3</sup> Church v. Hubbard, 2 Cranch, 237.

<sup>4</sup> Chicago & N. W. Ry. Co. v. Tuite, 44 Ill. App. 535.

**CHAPTER XXVI.****CHARACTER AND SUFFICIENCY OF PROOF.**

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#### **DIRECTING VERDICT.**

Trial courts meet with considerable embarrassment, in many cases, as to the proper course to pursue where the court is convinced that a verdict for the plaintiff would be unjust, and against the clear and decided weight of the evidence,—whether to send the case to the jury under proper instructions, and, if the verdict is returned, exercise its discretion, and set it aside, or direct a verdict in the first instance. The former course places the court in an unpleasant attitude, and subjects the judge, many times, to unfavorable criticism. It will not be questioned but that the appellate courts ought to jealously guard the prerogatives of juries, and countenance no procedure which would tend to the impairment or destruction of the jury system; yet it has become a matter of common knowledge that juries, as a class, too frequently are influenced in their determinations, in per-



sonal injury cases brought against large corporations, by feelings of sympathy or prejudice, which often induce them to ignore absolutely the questions of the weight, credibility, or preponderance of evidence, and to formulate a verdict more in accordance with their own peculiar notions.

This evident disposition among juries has a disparaging effect upon the investment of capital in manufacturing enterprises, and is becoming of so much importance that either the courts or legislature must devise some means, consistent with the preservation of the true prerogatives of juries, by which perverse and unjust verdicts may to some extent be avoided. This evil is not so great in some of the states as in others; and the reason why it is not is found in the latitude of the discretion vested in the trial courts, or, more properly speaking, in the trial judges.

It can hardly be questioned at this day that the rule prevailing in New York, in the federal courts, and adopted by many of the states,—in effect, that the judge should not send a case to the jury when he would feel justified in setting aside a verdict, if rendered, as being against the decided weight of the evidence, and could only be the result of partisanship, sympathy, or malice,—is the more correct and just one; that sending such a case to the jury for determination, and thus experimenting with them, is not only an idle ceremony, but one productive of increased expense and otherwise bad results. Within the past few years many of the most able and enlightened courts of this country have changed their methods to conform to this procedure. The federal courts finally yielded; and even the courts of Iowa, after a struggle for years, recognizing its apparent justice, and having delayed on supposed constitutional grounds, have found a way to break away from old traditions and old forms, and adopted the rule to its full extent.

In view of the importance of this question the writer

feels justified, even at the risk of wearying the reader, in presenting at some length the views of many courts; thus presenting what apparently is the rule in different states. It will aid courts and practitioners, as oftentimes the fact that either the court has directed a verdict or refused so to do is presented to another court as a precedent to be followed, which ought to be of little weight until it is ascertained what the rule is in the state where the precedent was made.

In the federal supreme court, in *Randall v. Baltimore & O. R. Co.*<sup>1</sup> the court thus state the rule: "It is the settled law of this court that when the evidence given at the trial, with all inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."<sup>2</sup> And they say it has recently been decided by the house of lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established, by sufficient evidence, from which negligence can be reasonably and legitimately inferred, and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred.<sup>3</sup>

In *Pleasants v. Fant*<sup>4</sup> the following language is used: "It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights, in the conduct of a trial. This is done by making plain to

<sup>1</sup> 109 U. S. 482, 3 Sup. Ct. 322.

<sup>2</sup> *Pleasants v. Fant*, 22 Wall. 110; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553.

<sup>3</sup> *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193.

<sup>4</sup> 22 Wall. 120.

them the issues they are to try; by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied; and finally, when necessary, by setting aside a verdict which is unsupported by evidence and contrary to law. In the discharge of this duty, it is the province of the court, either before or after verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether, on all the evidence, the preponderating weight is in his favor,—that is the business of the jury; but, conceding to all the evidence given the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it is not, then it is the duty of the court, after verdict, to set it aside, and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd; and accordingly we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In *Commissioners v. Clark*<sup>5</sup> the same court say: "The judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party bearing the burden of proof, unless the evidence be of such a character that it would warrant the jury in proceeding to find a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held

<sup>5</sup> 94 U. S. 278.

that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: That, before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Maine. Negligence must be proved by evidence having legal weight, and upon which the verdict of a jury would be allowed to stand. It would be absurd to send a cause to a jury when the verdict, if rendered for the plaintiff, would not be permitted to stand.<sup>6</sup>

In New York it is held that a direction of a verdict is proper in a case where the judge would be justified in setting aside the verdict if rendered contrary to the evidence;<sup>7</sup> that cases of negligence form no exception to the rule; that it is the judge's duty to nonsuit where a verdict for the plaintiff would be clearly against the weight of evidence; that no legal principle compels him to allow a jury to render a mere idle verdict.<sup>8</sup>

In California a court may grant a nonsuit, after the evidence on both sides has been heard, when, if the motion had been denied, and a verdict found for the plaintiff, it would have been set aside as not supported by the evidence.<sup>9</sup>

<sup>6</sup> *Brown v. Railroad Co.*, 58 Me. 384; *Connor v. Giles*, 76 Me. 134; *Wormell v. Railroad Co.*, 79 Me. 406, 10 Atl. 49; *Nason v. West*, 78 Me. 256, 3 Atl. 911.

<sup>7</sup> *Stuart v. Simpson*, 1 Wend. 376; *Stone v. Flower*, 47 N. Y. 566; *Sherwood v. Insurance Co.*, 5 Hun, 115.

<sup>8</sup> *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.

<sup>9</sup> *Vanderford v. Foster*, 65 Cal. 49, 2 Pac. 736; *Geary v. Simmons*, 39 Cal. 224.

In New Jersey: "The test of the powers of a judge to order a nonsuit does not lie in the absence of all testimony in opposition to the case in favor of which the ruling is made, but whether there is any testimony from which the jury can reasonably conclude that the facts sought to be proven are established."<sup>10</sup>

Kentucky. When the facts are conceded upon which the question of negligence is based, it then becomes a question of law as to whether negligence has been made out. Actions for negligence are governed by the same rules, with reference to the power of the court to grant a nonsuit, that other civil actions are; and it would be a useless waste of time, as well as trifling with the rights of litigants, for the court to permit a jury to deliberate upon a question of fact, when the party making the complaint has failed by his proof to show any right of action. A court, however, should be careful not to invade the province of the jury upon a question of fact; and where there is any proof conducing to sustain the cause of action, the case should go to the jury. It is only in cases where the court is satisfied that the verdict cannot be sustained by the evidence, and where the mind of the judge is entirely free from doubt upon this point, that such a right should be exercised.<sup>11</sup>

Connecticut. The statute authorizes the granting of a nonsuit where plaintiff has failed to make out a *prima facie* case.<sup>12</sup>

Massachusetts. When, in the opinion of any judge, the evidence which is introduced on a trial to prove a fact upon which a party relies does not prove such fact, or where he

<sup>10</sup> *Mead v. Crane*, 5 N. J. Law, 852; *Baldwin v. Shannon*, 43 N. J. Law, 596.

<sup>11</sup> *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 533; *Hanks v. Roberts*, 3 J. J. Marsh, 298.

<sup>12</sup> *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468.

is clear that a verdict for such party, founded on such evidence, would be set aside as a verdict against evidence, he may, in his discretion, state to the jury that the evidence is insufficient for the purpose for which it is offered, and advise them to find a verdict accordingly.<sup>13</sup>

New Hampshire. The case may be taken from the jury when no sufficient evidence has been adduced to justify a verdict.<sup>14</sup>

Pennsylvania. At one time, indeed, it was the admitted doctrine that if there was any, the least, evidence,—a mere *sciutilla*,—the question must be submitted to the jury. But that doctrine has been very justly exploded, both in England and in this state,<sup>15</sup> and in Georgia,<sup>16</sup> Illinois,<sup>17</sup> Indiana,<sup>18</sup> New Jersey,<sup>19</sup> and Missouri.<sup>20</sup>

Georgia. When there is not sufficient evidence to support a finding for the plaintiff, and when all the facts proved, and all reasonable deductions therefrom, would not support such a verdict, then the case should not be sent to the jury; but, on the other hand, the court cannot be compelled to take the place of the jury, and pass upon the facts by granting a nonsuit, because he would not be satisfied with a verdict in favor of the plaintiff.<sup>21</sup>

Iowa. The court say: "After a thorough examination of adjudged cases, we have reached the conclusion that the

<sup>13</sup> *Davis v. Maxwell*, 12 Metc. (Mass.) 286.

<sup>14</sup> *Bailey v. Kimball*, 26 N. H. 351; *Brown v. Insurance Co.*, 59 N. H. 298.

<sup>15</sup> *Raby v. Cell*, 85 Pa. St. 80.

<sup>16</sup> *Zettler v. City of Atlanta*, 66 Ga. 195.

<sup>17</sup> *Simmons v. Railroad Co.*, 110 Ill. 340.

<sup>18</sup> *Wels v. City of Madison*, 75 Ind. 241.

<sup>19</sup> *Baldwin v. Shannon*, 43 N. J. Law, 596.

<sup>20</sup> *Morgan v. Durfee*, 69 Mo. 409.

<sup>21</sup> *Cook v. Western & A. R. Co.*, 69 Ga. 619.

practice should be changed so as to harmonize with the better and more consistent rule which now obtains in England and in the United States courts, and in nearly all the states of the Union." After stating the rule as held in England and by the federal courts and some of the states, the court proceeds to say: "Our conclusion is that, when a motion is made to direct a verdict, the trial judge should sustain the motion when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests. The adoption of this rule is no abridgement of the right of trial by jury. A party against whom a verdict has been directed by the court can have the ruling of the court reviewed by exception and appeal, just as well as he can if the rule were otherwise, and he took an appeal to this court from an order granting a new trial after verdict. He has no right to insist that the trial of his cause be continued as a mere idle form or a mere experiment, that he may have the gratification of securing a verdict which must be set aside. As we have seen, courts very generally designate such a proceeding as absurd."<sup>22</sup>

In Wisconsin the rule is stated in many ways. At first the New York rule was applied.<sup>23</sup> Later it was held that, if the plaintiff give any evidence to support his claim, the case must be submitted to the jury, although, in the opinion of the trial judge, it may be insufficient to sustain a verdict or the decided weight of evidence is for the defendant.<sup>24</sup> Yet at the same time the same court held that the court was warranted in refusing to submit a question to the jury where the evidence was slight in favor of, and overwhelming against, it; that the test was whether the court would hesi-

<sup>22</sup> Meyer v. Houck (Iowa) 52 N. W. 235.

<sup>23</sup> Dryden v. Britton, 19 Wis. 22.

<sup>24</sup> Jones v. Chicago & N. W. Ry. Co., 49 Wis. 353, 5 N. W. 854.

tate to reverse such a finding.<sup>25</sup> And in the recent case of *McCoy v. Milwaukee St. Ry. Co.*,<sup>26</sup> where the plaintiff's testimony was uncorroborated, and was opposed by a number of credible witnesses, it was held an abuse of discretion not to set aside the verdict.

**Michigan.** The court may direct a verdict where there is but a mere scintilla of evidence; but if there is any evidence, though slight, the question is for the jury.<sup>27</sup> The syllabus to *Rosie v. Willard*,<sup>28</sup> wherein it is stated that a mere scintilla of evidence is sufficient to send the case to the jury, is incorrect. It was not so held.

**Minnesota.** Where the case is such that the court would be compelled to set aside a verdict, if rendered in favor of a party, because not reasonably supported by the evidence, the court may direct a verdict for the opposite party.<sup>29</sup>

Some of the states still cling to the old rule, originally firmly adhered to by the federal court and the courts of England. They followed them at first, and have not changed. Among such are Ohio, Tennessee, Alabama, and Arkansas.

**Ohio.** If there is any evidence, however slight, tending to prove facts essential to a recovery, they must be submitted to the jury. The court cannot consider the weight, but only the relevancy, of testimony.<sup>30</sup>

**Tennessee.** The courts do not tolerate the practice of granting nonsuits.<sup>31</sup>

<sup>25</sup> *Hogan v. Cushing*, 49 Wis. 171, 5 N. W. 490; *Bohan v. Railway Co.*, 61 Wis. 395, 21 N. W. 241.

<sup>26</sup> 82 Wis. 215, 52 N. W. 93.

<sup>27</sup> *Conely v. McDonald*, 40 Mich. 150.

<sup>28</sup> 44 Mich. 382, 6 N. W. 872.

<sup>29</sup> *Thompson v. Pioneer Press Co.*, 37 Minn. 285, 33 N. W. 856.

<sup>30</sup> *Ellis v. Insurance Co.*, 4 Ohio St. 648.

<sup>31</sup> *Scruggs v. Brackin*, 4 Yerg. 528.



**Alabama.** The case must be submitted to the jury. A nonsuit is improper.<sup>32</sup>

**Arkansas.** A nonsuit cannot be ordered in any case without the consent or acquiescence of the plaintiff. The court may advise, but not direct.<sup>33</sup>

**North Carolina.** After verdict, the court cannot order nonsuit. It can grant a new trial only.<sup>34</sup> But the doctrine of this state is the same as that of the federal court,—that a verdict should be directed where the court ought not to permit a verdict to stand.<sup>35</sup>

It is quite certain that some courts, in states where the New York or a similar rule is recognized, have failed to fully distinguish between the sufficiency of evidence offered to prove facts upon which negligence can or may be inferred, and the inference to be drawn from such facts, as establishing negligence; and therefore, in cases of alleged negligence, it is left to the jury to infer facts not sufficiently proven, as well as the inference deducible from such facts, if they are properly and sufficiently established.

Cases of alleged negligence, as was said by the New York court,<sup>36</sup> form no exception to the general rule; and the true distinction, and the duty upon the court and jury, respectively, is as stated by the English court in *Metropolitan Ry. Co. v. Jackson*.<sup>37</sup> Approved, as we have seen ante, by the federal court, and which we repeat in this connection: "It is for the judge to say whether any facts have been established, by sufficient evidence, from which negligence can be reasonably and legitimately inferred; and it is for the jury

<sup>32</sup> *Hunt v. Stewart*, 7 Ala. 525.

<sup>33</sup> *Martin v. Webb*, 5 Ark. 72.

<sup>34</sup> *Dickey v. Johnson*, 13 Ired. 450.

<sup>35</sup> *Wittkowsky v. Wasson*, 71 N. C. 451.

<sup>36</sup> *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.

<sup>37</sup> 3 App. Cas. 103.

to say whether, from those facts, when submitted to them, negligence ought to be inferred."

The rule has often been stated thus: "Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the question of negligence, under proper instructions, is for the jury." It is equally true that where the facts are undisputed, if they tend to show negligence, it becomes a matter of judgment and discretion—of sound inference—as to what is the deduction to be drawn from such undisputed facts, which is peculiarly the province of a jury.

Yet the court is not without some discretion in the matter. There may be cases where the court can and ought to say, as matter of law, that the facts do not justify an inference of negligence. Thus say an able court, in illustrating this exception: "If a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability."<sup>38</sup>

Perhaps a better illustration of the exception may be found in the doctrine now established and declared in most of the states,—“in effect, that it is the duty of a traveler, about to cross a railway track, to look both ways and listen for an approaching train before he proceeds, and declaring, as a matter of law, that the failure to observe this precaution is of itself negligence.” It will be observed that this legal presumption ignores entirely the rule that the traveler’s conduct is to be considered by the jury, and that it is for them to

<sup>38</sup> Railroad Co. v. Stout, 17 Wall. 663.

determine whether negligence ought to or should be inferred. This action by the courts is justified by the assumption that fair-minded men ought to come to but one conclusion upon such a state of facts. This may be true; but the inquiry is suggested, who is to determine what fair-minded men will say or conclude in reference thereto?

If courts must indulge in the presumption that all juries are composed of fair-minded men, why not in such cases receive their judgment upon every such state of facts? Why interference by the court? It admits of no doubt that the doctrine established by the courts is the true one, and that it ought to be extended, in its application, to cases where the act or conduct indicates negligence at least as forcibly as in the case referred to of a traveler about to cross a track. Too much importance is attached by appellate courts to the presumption that juries will act fair-mindedly and impartially, exercising judgment and discretion. Such presumption should not prevail when it is apparent that the presumption is overthrown.

The fact that the courts have seen fit to establish and declare certain conduct *per se* negligence goes far to prove that juries are not infallible, as well as the wisdom of those courts which hold the doctrine that the court ought not to submit the question to the jury where it would be justified in setting aside the verdict as against the weight of the evidence.

A case came under the writer's personal observation. Three teams on a cold winter's day approached a dangerous crossing. Just before reaching it, the drivers stood up, and listened for an approaching train; their view being obstructed from the north. Not hearing any, they advanced; the driver of the second, or middle, team getting onto the hind end of the forward sleigh, where his sense of sight was better than if he remained upon his own sleigh. His team

was gentle; would stop at the command "Whoa." He was in a position where, at the first warning of danger, he could take them by the bridle and stop them, or stop them by his command. An approaching train, running 30 miles an hour, and without giving any signal whatever, in a moment was upon them, killing the second team. Special findings were submitted to a jury of practical men, who found the foregoing as the facts, and, further, that the driver acted as a prudent man would under the same circumstances. The verdict was approved by the trial court. Yet the supreme court, in severe terms, said the driver's conduct was almost criminal carelessness.

In connection with the subject we are discussing, might we not very pertinently inquire, what superior knowledge or judgment was possessed by the judges of that court, as to what was practically prudent under the circumstances, to that possessed by the 12 fair-minded men who are the exclusive judges, as held by the same court, of the inferences to be drawn from such conduct? The court can hardly be said to be consistent.

It is conceded that the weight of evidence, ordinarily, is a question for the jury, where there is any substantial dispute or conflict; yet whether testimony offered or produced has legal weight, and ought to be considered by the jury, is a question for the court.

#### CONJECTURE.

The rule as to negligence is that it must be shown by affirmative proof. The facts upon which it is to be inferred as a reasonable inference must be established by such proof. Negligence is not presumed; therefore it follows that the existence or nonexistence of the facts cannot be left to conjecture. "Judicial determinations must rest upon facts, and legal liability must be determined by the law in application

to the facts. These rules will not exclude circumstantial evidence, for such evidence is often the strongest; but such evidence, after all, must establish facts. When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being clearly shown by competent evidence; and it is incumbent upon such a plaintiff to furnish such evidence to show how and why the accident occurred,—some fact or facts by which it can be determined by the jury, and not left entirely to conjecture, guess, or random judgment, upon mere supposition, without a single known fact.” This language was used by the learned court in *Sorenson v. Menasha Paper & Pulp Co.*,<sup>39</sup> where the only fact that was established by the evidence was that an employé of the defendant was found bruised and dead in a hole which had been cut through the floor in defendant’s mill, and in which was water about six feet deep. How he came there was left entirely to inference from circumstances attending his employment.

It was again said by the same court: “Every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference, conjecture, and personal experience.”<sup>40</sup> In *Trapnell v. City of Red Oak Junction*<sup>41</sup> the facts were: Plaintiff fell in the nighttime on a defective sidewalk, and was to some extent injured by the fall. She on that evening, and the next and following days, complained of pains in her breast, and liniments were applied. Some months afterwards it was discovered that the breast was enlarged and hardened, and in the mean time had continued to be painful. Surgeons pronounced the dis-

<sup>39</sup> 56 Wis. 338, 14 N. W. 446.

<sup>40</sup> *Sherman v. Menominee River Lumber Co.*, 77 Wis. 22, 45 N. W. 1079.

<sup>41</sup> 76 Iowa, 744, 39 N. W. 884.

ease sorconia,—a form of cancer,—and with their advice the breast was amputated. Experts gave it as their opinion that a blow or bruise might have been the exciting cause of the growth, but such result would only have followed in case the germ of the disease existed in the system before the injury. The court say: “While an injury by external force might have caused it to develop, it may also have developed without such cause. Before she can recover, she must establish that the relation of cause and effect existed between the fall and her suffering. But when we look into the evidence we find that it merely established a condition which might have been caused by an injury at the time; but whether such injury did occur is, under it, a matter of surmise. The existence of a fact is not proven by evidence of a subsequent condition which is merely consistent with its existence. It was therefore erroneous to submit the question to the jury.”

Lehman v. City of Brooklyn<sup>42</sup> was where a child was found drowned in a well, on which the cover had been negligently left open. The court say, after stating the duty and obligation of the city to keep the streets in proper condition: “The gist of the action, however, is negligence, which must be made out and established from proof, and not left to be inferred from circumstances. The proof need not be direct and positive, by some one who witnessed the occurrence, and saw how it happened, but it must be such as to satisfy reasonable and well-balanced minds that it resulted from the negligence of the defendant. It is not safe, I think, to say that because there was a well in the street, and the child was found drowned within half an hour after he was seen in health, the defendant’s negligence is made out. To entitle the plaintiff to recover, it must appear affirmatively

<sup>42</sup> 29 Barb. 234.

that the accident resulted wholly from the negligence of the defendant, and that the negligence and imprudence of the plaintiff did not contribute to the result." It was held error to put the defendant to its defense. In that state it has been held that plaintiff must negative his own negligence.

*Payne v. Railroad Co.*<sup>43</sup> was where a boy, while riding on a street car of the defendant, was either pushed off the car, or jerked off by the defendant's carelessness, or he accidentally slipped off, while the car was in motion. He died from his injuries there received. The court say: "The evidence fails to show that the boy's injury was caused by any act or neglect of the defendants. If bare probabilities are to be considered, it is difficult to determine what they tend to show; and in this case the circumstances proved are insufficient to establish negligence on the part of the company. If it had been left to the jury to find whether the injury occurred through the carelessness of defendant's servants, and they had found it did so occur, there is no evidence in the case sufficiently direct or positive to sustain such a finding. There must be something more than a probability of defendant's negligence. There must be some element of moral certainty, and exclusion of reasonable doubt."

*Stager v. Ridge-Ave. Pass. Ry. Co.*<sup>44</sup> was where a person was injured while in the act of getting upon a street car. Whether his foot slipped, or the driver removed the brake or applied the whip, was left in doubt. A nonsuit was ordered. The court say: "It was a cold morning in January. The track was probably covered with ice. The horses may have been impatient with cold, and the quick motion of the car forward might just as well be attributed to either or both of these causes as to the action of the driver. The truth is, however, there is not the slightest proof on the

<sup>43</sup> 40 N. Y. Super. Ct. 8.

<sup>44</sup> 119 Pa. St. 70, 12 Atl. 821.

subject. There was nothing in the evidence from which any well-founded inference could be drawn as to which of the several causes mentioned the sudden motion of the car could be attributed; and it is plain the jury would not be justified in determining the fact from mere conjecture. Facts are for the consideration of the jury only when there are facts to consider, and neither the court nor the jury were justified in making a guess as to the sudden starting of the car."

In *Gores v. Graff*,<sup>45</sup> where it was alleged that the neglect of the attending surgeon caused the patient's death, the court say: "There can be no recovery unless it is reasonably probable that Oleson would have lived had Dr. Graff treated him properly, and the existence of such reasonable probability must be proved; that is, facts and circumstances must be proved sufficient to bring conviction to a reasonable mind, without resorting to mere conjecture or uncertain and inconclusive inferences or bare probabilities, that the surgeon's neglect of duty was the proximate cause of the death of his patient."

From the foregoing, as well as from an array of cases where the question has been considered, it is manifest that, to meet the requirements of affirmative proof, something more must be shown than a mere probability of a negligent act or omission, or, where the act or omission is established, something more than a mere probability that it was the direct or proximate cause of the injury. There must be some element of certainty. It was said in *Sorenson v. Menasha Paper & Pulp Co.*, *supra*: "There are no facts in evidence by which the jury or any one can form a certain opinion upon the subject, so as to clearly determine the question of his negligence;" which amounts to an expression that the evi-

<sup>45</sup> 77 Wis. 174, 46 N. W. 48.



dence required to sustain a verdict based upon negligence must be clear and reasonably certain. Mere preponderance of evidence is not alone sufficient. Preponderance only arises when there is a conflict. It does not attach always or ordinarily to the character or sufficiency of the evidence. The evidence must be sufficient to establish the fact to a reasonable certainty, to satisfy the jury that it exists. As was said in *Gores v. Graff*, *supra*, "there may have been a preponderance of evidence tending to prove such facts, or some or all of them, and yet the evidence be quite insufficient to prove those facts." The same was said in *Dunbar v. McGill*.<sup>46</sup>

It may be correctly stated as a rule in all cases that proof of an alleged act or omission as causing injury is not sufficient as long as other causes exist and were present which might as well have caused it. Surmise and conjecture cannot supersede proof. There must exist some degree of certainty. There need not be absolute certainty, free from reasonable doubt, but sufficient must be shown to overcome or more than balance any presumption of the other causes having produced it.

#### ACCIDENT AS PROOF OF NEGLIGENCE.

The fact of the happening of an accident has no tendency to prove negligence,<sup>47</sup> for the very good reason, if for no other, that negligence, or the facts from which it is to be in-

<sup>46</sup> 64 Mich. 676, 31 N. W. 578.

<sup>47</sup> *Kuhns v. Railway Co.*, 70 Iowa, 561, 31 N. W. 868; *O'Connor v. Illinois Cent. Ry. Co.*, 83 Iowa, 105, 48 N. W. 1012; *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. 230; *Madden v. Steamship Co.*, 88 Cal. 448, 25 Pac. 5; *Griffin v. Railroad Co.*, 148 Mass. 143, 19 N. E. 166; *Wormell v. Railroad Co.*, 79 Me. 397, 10 Atl. 49; *Brymer v. Railway Co.*, 90 Cal. 497, 27 Pac. 371; *McKinnon v. Norcross*, 148 Mass. 553, 20 N. E. 183; *Blanchette v. Border City Manuf'g Co.*,

ferred, must be affirmatively proven. This statement of a rule must not be so understood as to deny that an accident itself may not reveal the cause, and thus furnish competent and sufficient proof of negligence. It may show defects of such a character, and of such long standing, that it may well be said that the exercise of ordinary diligence might and would have discovered them.

### POSITIVE AND NEGATIVE PROOF.

Affirmative proof must be positive in character, as distinguished from such as may be purely negative. Care must be taken to properly distinguish between proof of a negative and negative proof. The evidence to substantiate the former must be positive in character. A very frequent illustration of the rule arises when it is sought to establish that signals were not given of the approach of a train at highway crossings. This fact must be affirmatively proven, where it is relied upon as a cause for recovery. In general it is sought to be proven and established by persons who, having an opportunity to hear the signals, testify either that they did not hear them or do not remember that they heard them. In some cases a distinction has been made, from the language used by witnesses, as to whether they state they did not hear, or that they do not remember hearing, such signals; in the former case holding that such evidence has an element of a positive character, while in the latter it is purely negative. But this is too much like a distinction without a dif-

143 Mass. 21, 8 N. E. 430; *Baldwin v. Railroad Co.*, 68 Iowa, 37, 25 N. W. 918; *Case v. Railway Co.*, 64 Iowa, 762, 21 N. W. 30; *Id.*, 69 Iowa, 449, 29 N. W. 596; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Welwood*, 38 N. J. Law, 339; *Walker v. Railway Co.*, 71 Iowa, 658, 33 N. W. 224; *Morrison v. Phillips & Colby Constr. Co.*, 44 Wis. 405; *Smith v. Railroad Co.*, 42 Wis. 520.

ference,—a mere play upon words,—and the real questions, after all, are opportunity for hearing, and such attendant circumstances and conditions as would ordinarily and naturally impress the fact of signals not having been given upon the mind of the witness to such an extent that such impression would remain with him at the time he is called upon to testify as to the fact.

A well-considered case in which this question was determined is *Bohan v. Railway Co.*<sup>48</sup> It fully expresses the rule, and its reasoning ought to be conclusive. The plaintiff and several witnesses testified that they did not remember to have heard the engine bell ring before the plaintiff was injured, nor to have seen any person or light on the forward end of the car. The conductor, engineer, fireman, and the brakeman who held the lantern, each testified that the lantern was so held by such brakeman, and three of them testified that the signal was given. The court say: "The testimony of the plaintiff's witnesses that they did not hear the bell ring, or did not see the lighted lantern at the head of the gravel cars, is purely negative, and its negative character is intensified by the fact—which is made perfectly obvious by their testimony—that they did not look attentively, but only casually, at the approaching train, and the attention of none of them was directed to the presence or absence of such warnings. Upon this record, the credibility of the defendant's witnesses, who testified positively to the ringing of the bell, and the presence of the brakeman on the gravel car with a lighted lantern, stands unimpeached. The jury are not at liberty to disregard their testimony, but it was their duty to reconcile the testimony of all the witnesses, if that could reasonably be done. There is no difficulty in doing so in this case. The testimony of the defendant's wit-

<sup>48</sup> 61 Wis. 391, 21 N. W. 241.

nesses is positive that the bell was seasonably rung, and that the brakeman stood on the forward end of the leading gravel car, holding a lighted lantern; and that of the plaintiff's witnesses is that, although they had the opportunity to hear and see such warnings, they failed to do so. The testimony does not tend to show a single fact or circumstance which gives a positive character to the testimony of the plaintiff and his witnesses. Such being the nature of the testimony, the fact that the warnings were given was established, if not by the undisputed evidence, certainly by an overwhelming preponderance of testimony; and the jury were not justified in finding they were not given. Indeed, the negative testimony of plaintiff and his witnesses, while it has some bearing upon the question of the warnings, amounts to little more than, so to speak, a mere scintilla of evidence, and did not justify the jury in their disregard of all the positive and otherwise unimpeached testimony that the warnings were given."

Substantially the same reasoning was made in *Moran v. Eastern Ry. Co.* by the supreme court of Minnesota.<sup>49</sup> They state the rule thus: "The testimony of a witness that he did not hear the signals is of itself, as against direct and positive testimony that they were given, no evidence that they were not given, but, taken in connection with evidence showing that he could and probably would have heard them had they been given, is sufficient to warrant the jury in finding they were not given."

Substantially the same rule prevails in Illinois,<sup>50</sup> Pennsylvania,<sup>51</sup> and many other states. In the case last cited the testimony of the plaintiff, who was proceeding over the crossing, was insufficient to raise a conflict in the testimony.

<sup>49</sup> 48 Minn. 46, 50 N. W. 930.

<sup>50</sup> *Ohio & M. Ry. Co. v. Reed*, 40 Ill. App. 47.

<sup>51</sup> *Hauser v. Railroad Co.*, 147 Pa. St. 440, 23 Atl. 766.

In a recent case in the federal circuit court of appeals it was held that negative testimony of such a nature was insufficient to present an issuable fact. It was said: "In the very nature of things, their affirmative testimony that the warning was given must be accepted as proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it, from whatever cause. There is, in such cases, no conflict of evidence as to the matter in question. The observation of the fact by some is entirely consistent with the failure of others to observe it, or their forgetfulness of its occurrence."<sup>52</sup>

In *Culhane v. Railroad Co.*<sup>53</sup> the court say: "It is proved by the positive oath of the two individuals on the engine, one of whom rang it [the bell], and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. As against positive, affirmative evidence by credible witnesses of the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching, and listening for it; that their attention was directed to the fact,—so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence, justifying a submission of the question to the jury as one of fact." In recent cases<sup>54</sup> the above rule was followed. In

<sup>52</sup> *Horn v. Baltimore & O. R. Co.*, 4 C. C. A. 346, 54 Fed. 301.

<sup>53</sup> 60 N. Y. 137.

<sup>54</sup> *Reiney v. Railroad Co.*, 68 Hun, 495, 23 N. Y. Supp. 80; *Hoffmann v. Railroad Co.*, 67 Hun, 581, 22 N. Y. Supp. 463.

Kansas the same reasoning was stated, and rule declared, with the exception that it was qualified by stating that such testimony is of but little weight.<sup>55</sup>

In some cases the rule has not been strictly applied. The supreme court of Iowa and of some other states hold such evidence competent, and to be considered by the jury. The Iowa court is very liberal in respect to the character and nature of evidence to be submitted to a jury. Whether, since it has adopted the New York rule, its practice in this respect will be influenced, of course cannot as yet be stated.

The country being traversed with a network of railroads, the signals upon engines have become familiar sounds. Those whose dwellings border upon railroad tracks; those who are accustomed daily to hear the blasts of whistles and the ringing of bells, and see passing trains,—ordinarily take no note of them. They hear and see, and yet no impression is made. How few persons who have been accustomed to the old clock upon the shelf take note as it strikes the hours that mark the passing time! How few could truthfully say that it did not strike! To give any weight to testimony of persons who had the opportunity to hear it strike, yet testify they did not hear it, is the merest nonsense. They may be honest in their statement; yet it fails to prove, or tend to prove, that it did not strike. Its only force is, and can be, that they took no note of it at the time, or, if they did, it was not impressed upon the mind. Much different would be the case if a person was watching and waiting for an approaching train, who was driving a horse, fractious, and not accustomed to the cars, or otherwise circumstanced so that his attention would naturally be directed to the subject of the giving of signals. The testimony of such a witness, to some extent, would be positive in character, as tending to prove a negative.

<sup>55</sup> Kansas City, F. S. & G. R. Co. v. Lane, 33 Kan. 702, 7 Pac. 587.

## CHAPTER XXVII.

### CHARACTER AND SUFFICIENCY OF PROOF (Continued).

**Generally incompetent to show independent acts of negligence, p. 514.**

**But there are exceptions to the rule, p. 514.**

**Similar accidents from same cause, p. 515.**

**General reputation and habits, p. 515.**

**Evidence as to locomotives emitting sparks, p. 517.**

**Failure of railroad company to signal, p. 517.**

**Evidence of similar defects at other places generally incompetent, p. 518.**

**Exceptions to the rule, p. 518.**

**Other accidents at same place and in same manner, p. 519.**

**Such evidence admissible to show notice of defect, p. 522.**

**As to speed of trains, p. 523.**

**Precautions after the accident, p. 525.**

**Custom and customary methods, p. 527.**

**Evidence as to defendant's knowledge, p. 530.**

**Opinion evidence, p. 531.**

### INDEPENDENT ACTS OF NEGLIGENCE.

It is incompetent, generally, to show other distinct and independent acts of negligence; yet there are cases where this rule would not apply. It may be proper, under some conditions, where the master's knowledge of the incompetency of his servant is sought to be charged. Also, it may be proper to show that an appliance was previously op-

erated in a similar manner, or produced like results, as tending to show that it was defective in fact, and also knowledge on the part of the principal of its unsafe character or condition.<sup>1</sup>

Evidence of similar accidents, resulting from the same cause, has often been held competent for this purpose;<sup>2</sup> but, to render such evidence competent, it must appear, or at least the evidence must reasonably tend to show, that the instrument or agency whose condition is in issue was in substantially the same condition at such times as it was when the accident complained of occurred.<sup>3</sup>

It was said in *Robinson v. Fitchburg & W. R. R.*:<sup>4</sup> "Evidence of specific acts of negligence and carelessness on the part of the engineer in running the train on other occasions than the one in question is clearly incompetent. It would not only lead to collateral inquiries, and so distract and mislead the jury from the true issue before them, but it has no legal or logical tendency to prove the point in issue. Because a man was careless or negligent of his duty in one or two specific instances, it does not follow that he was so at another time, and under different circumstances. The plaintiff did not offer to prove the general character of the en-

<sup>1</sup> *Morse v. Railway Co.*, 30 Minn. 471, 16 N. W. 358; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 279; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *McDonald v. Savoy*, 110 Mass. 50; *Robinson v. Fitchburg & W. R. R.*, 7 Gray, 92; *Gahagan v. Railroad*, 1 Allen, 187.

<sup>2</sup> *Kent v. Town of Lincoln*, 32 Vt. 591; *Quinlan v. City of Utica*, 11 Hun, 217; *Willey v. Portsmouth*, 35 N. H. 303; *City of Chicago v. Powers*, 42 Ill. 169; *Piggot v. Eastern Counties Ry. Co.*, 3 C. B. 229; *House v. Metcalf*, 27 Conn. 631; *Hill v. Portland & R. R. Co.*, 55 Me. 438; *Darling v. Westmoreland*, 52 N. H. 401; *Myers v. Hudson Iron Co.*, 150 Mass. 138, 22 N. E. 631.

<sup>3</sup> *Morse v. Railway Co.*, 30 Minn. 472, 16 N. W. 358.

<sup>4</sup> 7 Gray, 92.



gineer for care and skill in the business. Such testimony would have certainly been less objectionable, though not perhaps competent.”<sup>5</sup> And again, in *Tenney v. Tuttle*:<sup>6</sup> “The rule is but reasonable, since defendant cannot be allowed to show his previous general carefulness as an excuse for his conduct at the time in question.”

Evidence of the general reputation of a servant as a reckless driver, or that he had been careless on other occasions, is inadmissible;<sup>7</sup> but it is competent to introduce evidence as to the driver's want of skill before and after the accident,<sup>8</sup> though this is questioned by some courts.<sup>9</sup>

Some courts hold a contrary rule from that first stated, and to the effect that it is competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question.<sup>10</sup>

The Wisconsin court holds that evidence tending to show habitual recklessness and carelessness is inadmissible,<sup>11</sup> but that it is competent to show the disposition and habits of a team as to racing.<sup>12</sup> The same court say, in *Gibbons v. Railroad Co.*:<sup>13</sup> “It would be monstrous doctrine that when a party is sued in tort for a personal injury to another,

<sup>5</sup> *Baulie v. Railroad Co.*, 59 N. Y. 366.

<sup>6</sup> 1 Allen, 185.

<sup>7</sup> *Jacobs v. Duke*, 1 E. D. Smith, 271; *Dunham v. Rackliff*, 71 Me. 345.

<sup>8</sup> *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, and 54 Am. Rep. 544.

<sup>9</sup> *Dunham v. Rackliff*, 71 Me. 345; *Peterson v. Adamson*, 67 Iowa, 739, 21 N. W. 701.

<sup>10</sup> *Parkinson v. Railroad Co.*, 61 N. H. 416; *Ford v. Parker*, 4 Ohio St. 576.

<sup>11</sup> *Brennan v. Town of Friendship*, 67 Wis. 223, 29 N. W. 902.

<sup>12</sup> *Shaefer v. Osterbrink*, 67 Wis. 497, 30 N. W. 922.

<sup>13</sup> 58 Wis. 339, 17 N. W. 132.

occasioned by his negligence in not furnishing proper appliances or otherwise, his common recklessness or carelessness in other cases tend to prove the possibility, and therefore probability, that the act charged was the result of his negligence, without proof even that he committed it." The learned court reviews the authorities, with reference specially to the competency of evidence as to locomotives emitting fire, and conclude that it is competent to show that, after a locomotive passed, fires sprang up in different places along the route, as tending to show the improper construction or condition of such engine; but to show that such fires sprang up after the passage of several locomotives is incompetent. Yet where the cause of the fire is traced to the track, and left the belief that some one of the defendant's engines had emitted coals, it becomes necessary to permit the party to show that the emitting of sparks and coals in unusual quantities was frequent, and was permitted to be done by a number of engines; citing several cases.<sup>14</sup> The court claims that where language is used, in other cases, seemingly adopting any other rule, it is owing to a looseness of expression, which is very common in such cases.

This court<sup>15</sup> held that it was competent to show that the whistle of a certain engine was not blown or bell rung at a crossing three miles distant from the crossing which was the scene of the accident, as tending to show that these signals were not given at the place of the accident. This ruling is justified upon the ground that it related to the management of such locomotive upon the very trip and near the place of the accident, and would establish more than a possibility, from which a probability could be inferred, that no such

<sup>14</sup> *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405; *Henry v. Railroad Co.*, 50 Cal. 176; *Woodsen v. Railroad Co.*, 21 Minn. 60.

<sup>15</sup> *Bower v. Railway Co.*, 61 Wis. 463, 21 N. W. 536.

signals were used at the crossing in question, and would create a strong and direct probability that they were not, because it was not customary to use such signals at other like crossings. The reasoning of the court is a little too refined to impress one with its force, and I must say that it appears to be one of those "distinctions without a difference" which we often meet. The very language used not only implies, but expresses directly, an habitual carelessness and evasion of duty, not at the same place, but at another. It cannot be reconciled with their general doctrine upon this subject. The neglect to give the signals would not be, as the court would infer, the customary usage of machinery, but rather the customary conduct of the individual in charge.

#### DEFECTS AT OTHER PLACES.

Evidence of other or similar defects is generally incompetent, unless limited to those defects which caused, or reasonably might have conduced to produce, the injury. The mere existence of other defects in other parts of the road is not evidence that a similar defect existed at the place of the casualty, and caused it. The exceptions to this rule are where the other defects are shown to be the result of a cause presumptively operating at the place of the casualty, or where such other defects might have caused the defect which produced the injury.<sup>16</sup> *Randall v. Telegraph Co.*<sup>17</sup> probably comes within the exception. The plaintiff was injured by coming in contact with wires of the defendant's line, which had become detached from the poles, and were lying loose upon the ground. The plaintiff introduced evidence to

<sup>16</sup> *Morse v. Railway Co.*, 30 Minn. 468, 16 N. W. 358; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 540; *Louisville & N. R. Co. v. Fox*, 11 Bush. 495.

<sup>17</sup> 54 Wis. 142, 11 N. W. 419.

show that the wires were down at other places, or had been down within a short time previous. The court say: "We are not prepared to say that there was any error in admitting this evidence, so far as it was limited to proof of the fact that the wire and poles were down at the times and places mentioned by the witnesses. It was probably inadmissible for the purpose of showing that other persons had suffered injury from the fact of the falling of the poles or wire; but the fact that the poles and wire were down at other places and times, within a few miles of the place, and within a few months of the time when the plaintiff was injured, would seem to us competent proof upon the question of the negligence of the company in maintaining the line in a safe condition. \* \* \* The fact that the evidence related to a time a few months before the accident, or a place a few miles distant therefrom, would render the proof less conclusive than though it had related to a time a few days before the accident, or a place very near, but it would not affect the competency of the proof."<sup>18</sup>

As to whether it is competent to show that other persons have been injured at the same place, and in the same manner, there is a decided conflict in the authorities. In the earlier cases it was quite generally held that such evidence was inadmissible, upon the ground of its collateral character, and as furnishing no legal presumption as to the principal facts in dispute.<sup>19</sup>

Some of the early cases, and quite generally the later

<sup>18</sup> *Propson v. Leatham*, 80 Wis. 609, 50 N. W. 586.

<sup>19</sup> *Collins v. Dorchester*, 6 Cush. 397; *Aldrich v. Pelham*, 1 Gray, 510; *Hubbard v. Concord*, 35 N. H. 52; *Piollet v. Simmers*, 106 Pa. St. 95; *Starkie, Ev.* 381; 1 Greenl. *Ev.* §§ 52, 448; 1 *Thomp. Neg.* 801; *Whart. Neg.* § 359; *Cleveland, C., C. & I. Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118.

cases, hold that evidence of other persons' having sustained similar injuries at the same place is competent.<sup>20</sup>

The reasoning in the case of *Darling v. Westmoreland*<sup>21</sup> is strong and satisfactory. The question under discussion was whether it was competent to show that other horses had been frightened at the same pile of lumber which caused fright to plaintiff's horse, as competent proof to show its character in that respect. The court sarcastically says: "The law is a practical science; and when it is appealed to, to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment, and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him, and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that is justly called a 'principle.'"

In *District of Columbia v. Armes*<sup>22</sup> it was held competent to show that other people had fallen upon the alleged defective sidewalk; and the same ruling was made in *Quinlan v. City of Utica*.<sup>23</sup>

It is generally, however, considered incompetent for the

<sup>20</sup> *Wooley v. Railroad Co.*, 83 N. Y. 121; *Phelps v. Railroad Co.*, 37 Minn. 485, 35 N. W. 273; *Darling v. Westmoreland*, 52 N. H. 401; *Kent v. Town of Lincoln*, 32 Vt. 591; *Quinlan v. City of Utica*, 74 N. Y. 603; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840; *Hill v. Portland & R. R. Co.*, 55 Me. 439; *Augusta v. Hafers*, 61 Ga. 48; *City of Chicago v. Powers*, 42 Ill. 169; *Crocker v. McGregor*, 76 Me. 282.

<sup>21</sup> 52 N. H. 401.

<sup>22</sup> 107 U. S. 519, 2 Sup. Ct. 840.

<sup>23</sup> 74 N. Y. 603.

defendant to show that injury had not been occasioned others, as tending to show care or proper condition.<sup>24</sup> The case of *Field v. Davis*<sup>25</sup> is somewhat in conflict with this rule.

In New York the court of appeals has sanctioned this as a rule: "When an appliance or machine, not obvious'y dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe, and convenient, its use may be continued without imputation of imprudence or carelessness."<sup>26</sup>

The supreme court of Massachusetts,<sup>27</sup> in referring to this rule, reject it as such, but state that the fact (with reference to the case before them) that no person had been hurt is entitled to much weight, but was not conclusive of the defendant's due care.

In *Phelps v. City of Mankato*,<sup>28</sup> *Kelly v. Railway Co.*,<sup>29</sup> *Morse v. Railway Co.*,<sup>30</sup> and *Doyle v. Railway Co.*<sup>31</sup> it is held that evidence was admissible showing that other accidents had occurred from the same defect or cause complained of. The court in the latter case, however, say: "Such evidence should probably only be received where there is doubt as to the existence of the defect complained of, or where the dangerous character or nature of the thing complained of would

<sup>24</sup> *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71; *Hudson v. Railroad Co.*, 59 Iowa, 581, 13 N. W. 735; *Schoonmaker v. Wilbraham*, 110 Mass. 134; *Hubbard v. Concord*, 35 N. H. 52; *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613.

<sup>25</sup> 27 Kan. 400.

<sup>26</sup> *Stringham v. Hilton*, 111 N. Y. 196, 18 N. E. 870; *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Burke v. Witherbee*, 98 N. Y. 562.

<sup>27</sup> *Myers v. Hudson Iron Co.*, 150 Mass. 136, 22 N. E. 631.

<sup>28</sup> 23 Minn. 276.

<sup>29</sup> 28 Minn. 98, 9 N. W. 588.

<sup>30</sup> 30 Minn. 465, 16 N. W. 358.

<sup>31</sup> 42 Minn. 82, 43 N. W. 787.

not be obvious as a matter of common knowledge and experience. If such evidence is admissible to show that what is complained of was of a dangerous character, it must be that evidence would be admissible on the other side to show that, in a long-continued use of such instrumentalities, accidents had been unknown. That would be a proper means of showing that a thing which was not obviously dangerous was not in fact so."

The New York courts uniformly hold such evidence competent.<sup>32</sup> It was held in *Dye v. Railroad Co.*:<sup>33</sup> "While, in an action against a railroad or municipal corporation to recover damages for injuries alleged to have been caused by defendant's negligence, it is important to show that defendant had notice of the dangerous character of the defect which caused the injury, testimony is competent to prove other similar accidents. Such evidence is not competent when it can have no bearing upon the issues presented." So held, when an employé sought to recover damages, sustained when engaged in coupling cars, occasioned by the overlapping of deadwoods; that the admission of testimony showing that similar accidents had occurred on defendant's road was error.

It has been held that such evidence is competent in a class of cases when it is important to show that the defendant had notice or was warned of the dangerous character of municipal sidewalks, or the inadequacy of facilities provided for the passage of passengers to and from trains over the company's premises.<sup>34</sup>

<sup>32</sup> *Lafflin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Burke v. Witherbee*, 98 N. Y. 562.

<sup>33</sup> 130 N. Y. 671, 29 N. E. 320.

<sup>34</sup> *Gillrie v. City of Lockport*, 122 N. Y. 403, 25 N. E. 357; *Brady v. Railway Co.*, 127 N. Y. 46, 27 N. E. 368.

**SPEED OF TRAINS.**

Questions touching the rate of speed of a moving train are not properly scientific inquiries, and are not beyond the competency of ordinary witnesses who had means and habits of observation; yet the well-known liability of all common observers to be deceived as to the rate of speed of heavy trains renders it necessary to guard, as far as possible, against vague testimony, which cannot be directly met or corroborated by proof of persons having actual knowledge upon the subject. Testimony of actual speed is tangible, whatever may be the value of the opinions of particular observers; but opinions on relative speed, without some standard of rapidity, are of no value by themselves. Opinions of persons riding on the cars, and not observing from the outside, may be received under some circumstances; but they should be excluded unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumed that ordinary railway travelers usually form such habits.<sup>35</sup>

The opinions of observers, to amount to anything more than a mere scintilla of evidence, must be based upon attention to the moving train at the time, with reference to its rate of speed, and, ordinarily, that they watched the train as it progressed, with reference to the time occupied in passing the space between objects, the distance between which could be ascertained. Testimony of ordinary observers as to such rate of speed, while it may tend to show that the train was moving fast, as distinguished from a slowly-moving train, would be most unreliable and unsatisfactory, and especially

<sup>35</sup> Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 540.



where their attention is not called to the subject at the time, and their opinions are based upon a vague recollection or an impression which they seek to recall months afterwards.<sup>36</sup>

The writer is aware that the Iowa court and some<sup>1</sup> others have gone to great length in admitting opinions of mere casual observers, and justify it upon the ground that the jury is to judge of the weight of the evidence, and it ought not to be presumed they will attach more importance to such opinions than good judgment will approve.

It would seem that the better rule would be for the court to determine, in the first instance, whether the observer's experience, and the attention paid to the train at the time, and the conditions existing, from which he could form an intelligent and reasonably accurate judgment, were such as to entitle his opinion to legal weight with the jury, to be considered by them. This is the rule as to experts ordinarily, and no good reason can be urged for a departure in cases of nonexperts. It does not infringe upon the province of the jury to determine the weight of their testimony, but simply determines the competency of a witness to give any testimony, or whether his opinions are competent evidence. These are ordinarily, in other matters, purely questions for the court. The qualification of an expert is a question of fact, to be decided by the court upon evidence. To permit casual observers to give an opinion in such cases is trifling with law and justice. It amounts to nothing more than an unreliable guess. The writer has observed an array of witnesses, testifying to the rate of speed of a train, stating it to be 30 miles an hour, when the grade, weight of train, and capacity of the engine were such that a rate of speed in excess of 12 miles an hour was a practical impossibility, and

<sup>36</sup> *Muster v. Railway Co.*, 61 Wis. 332, 21 N. W. 223.

when, at the same time, small boys were getting on and off the train with the utmost facility.

### PRECAUTIONS AFTER ACCIDENT.

Frequently, the fact that after an accident repair was made is urged as evidence proper to be considered, in determining the fact, as well as the extent or character, of such alleged defect. Such evidence is inadmissible.<sup>37</sup> In fact, with the exception of Kansas—where it is admitted that the weight of authority is in favor of the rule as above stated—and Pennsylvania, this doctrine is universal.

As stated by the supreme court of Wisconsin in *Lang v. Sanger*:<sup>38</sup> "To show the fallacy of the rule [speaking of a contrary one adopted by the trial court], it is only necessary to say that the gangway and sawguard might have been out of repair to an extent only that could not have caused the injury or rendered the defendants liable, and yet may have been afterwards repaired. The defendants were entitled to that presumption, and therefore subject to no other."

Again, say the same court: "If the fact admitted of such an inference [referring to an inference of defect from the fact of making repairs], then the fact that a person at a

<sup>37</sup> *Lang v. Sanger*, 76 Wis. 75, 44 N. W. 1095; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Payne v. Troy & B. R. Co.*, 9 Hun, 526; *Salters v. Delaware & H. Canal Co.*, 3 Hun, 338; *Dale v. Railroad Co.*, 73 N. Y. 468; *Castello v. Landwehr*, 28 Wis. 524; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Martin v. Towle*, 59 N. H. 31; *Wooley v. Railroad Co.*, 83 N. Y. 121; *Hudson v. Railroad Co.*, 59 Iowa, 581, 13 N. W. 735; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965.

<sup>38</sup> 76 Wis. 75, 44 N. W. 1095.

certain time commences using and exercising extraordinary care in a given case may be used against him to prove that before such time he had failed to use reasonable and ordinary care in a given case.”<sup>39</sup>

The supreme court of Minnesota, in several decisions, had held such evidence competent, but in *Morse v. Railway Co.*<sup>40</sup> they overruled their former decisions, and stated that upon principle they were wrong; not for the reason given by some courts,—that the acts of the employes in making such repairs are not admissible against their principals,—but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person, they say, “may have exercised all the care which the law required; yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, and the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.”

In Massachusetts and some other states such evidence has been admitted, upon the question of duty to make the repairs, as admissions of such duty, but not as admissions of neglect or of their necessity at the time of the accident.<sup>41</sup>

In Pennsylvania such evidence is admissible as an admis-

<sup>39</sup> *Castello v. Landwehr*, 28 Wis. 524.

<sup>40</sup> 30 Minn. 465, 16 N. W. 358.

<sup>41</sup> *Readman v. Conway*, 126 Mass. 374; *Sewell v. City of Cohoes*, 11 Hun, 626.

sion that the defendant was negligent in not having before made the repairs;<sup>42</sup> and the same in Kansas.<sup>43</sup>

### CUSTOM AND CUSTOMARY METHODS.

In a former chapter the conclusive effect of a general custom upon the question of ordinary care was considered. The competency of evidence as to such a custom is generally recognized.<sup>44</sup>

In *Georgia Pac. Ry. Co. v. Propst*<sup>45</sup> the court say, as to the competency and effect of such evidence: "If the draw-heads and bumpers were such as were employed by many well-conducted roads, this would repel all imputation of negligence founded on their mere structure, although other roads, even a majority of them, adopted a different pattern. Witnesses who have sufficient knowledge of the subject may testify to the general rules of railroads on the subject."<sup>46</sup>

In *Kelly v. Railway Co.*<sup>47</sup> witnesses were allowed to state the manner in which planks at crossings were usually laid.

\* *Pennsylvania Ry. Co. v. Henderson*, 51 Pa. St. 315; *McKee v. Bidwell*, 74 Pa. St. 218; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311.

\* *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408. and 57 Am. Rep. 176.

\* *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Lafflin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Martin v. Railway Co.*, 94 Cal. 326, 29 Pac. 645; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276; *Kolsti v. Railway Co.*, 32 Minn. 133, 19 N. W. 655; *Kelly v. Railway Co.*, 28 Minn. 98, 9 N. W. 588; *Doyle v. Railway Co.*, 42 Minn. 82, 43 N. W. 787; *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 526, 3 South. 764.

\* 83 Ala. 526, 3 South. 764.

\* *Louisville & N. R. Co. v. Hall*, 87 Ala. 722, 6 South. 277.

\* 28 Minn. 99, 9 N. W. 588.

The court say: "Such evidence was competent. The degree of care which was required of defendant in maintaining this crossing being that which men of ordinary prudence would usually exercise under like circumstances, evidence as to the manner in which such crossings were usually constructed was competent, although, of course, not conclusive, evidence against defendant on the question of negligence."

Again, in *Kolsti v. Railway Co.*,<sup>48</sup> the same court say: "When the question is, did a person use ordinary care? the test is the amount of care ordinarily used by men in general in similar circumstances. If it be matter of common knowledge, such amount of care needs no proof; the jury take notice of it. But if it pertain to some special business which the jury cannot be supposed to know, it may be proved." Testimony of such character relates to a fact, and is not the mere expression of an opinion.<sup>49</sup>

It was held in *Murphy v. Greeley* <sup>50</sup> that it was competent for the defendant to show the custom and usage of builders in reference to openings in the floors of buildings while in the process of construction. Taken in connection with the experience of the servant, it would tend to show what he had a reason to expect, and what danger he was called upon to guard against. It was thus competent as to the question of his exercise of due care.

It is competent to show, in order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining machinery and appliances actually in use, what other kinds of machinery or appliances

<sup>48</sup> 32 Minn. 134, 19 N. W. 655.

<sup>49</sup> *Michigan Cent. Ry. Co. v. Coleman*, 28 Mich. 448; *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517; *Daley v. American Print Co.*, 152 Mass. 581, 26 N. E. 135; *Ship-Building Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65.

<sup>50</sup> 146 Mass. 196, 15 N. E. 655.

were used elsewhere, and might have been used at the time and place in question.<sup>51</sup>

It does not follow from the introduction of such evidence that the defendant was bound to use the very safest or newest, or any particular, machinery or appliances; but as "reasonable care" is a relative term, the jury might properly consider what could be done to secure safety.<sup>52</sup>

It was held in *Pennsylvania Co. v. Hankey*<sup>53</sup>—an action by a brakeman, who alleged that his injuries were caused by a want of ballast in a part of the side track—that it was competent to prove that it was not unusual for railroad companies to have in use unballasted side tracks. Such evidence is competent on the question of what vigilance was required of a brakeman under such circumstances. The court says: "We have often decided that travelers, when about to cross or walk on a railroad track, are required by common prudence to look and see whether any train is approaching. It would seem that a brakeman, about to change links when the train is in motion, must be required by common prudence to look, if he can, and see what kind of a track he is to pass over." Again: "Surely he had no reason to assume or suppose that this side track was ballasted, unless by the custom of railroad companies such tracks were very generally, if not universally, ballasted." The court, after stating further the duty of the servant under such circumstances, concludes by saying: "And if it [the track] be not ballasted, ordinary care plainly requires

<sup>51</sup> *Wheeler v. Wason Manuf'g Co.*, 135 Mass. 298; *Myers v. Hudson Iron Co.*, 150 Mass. 138, 22 N. E. 631; *Washington & G. R. Co. v. McDade*, 133 U. S. 554, 10 Sup. Ct. 1050.

<sup>52</sup> *Wheeler v. Wason Manuf'g Co.*, 135 Mass. 298; *Myers v. Hudson Iron Co.*, 150 Mass. 138, 22 N. E. 631; *Washington & G. R. Co. v. McDade*, 133 U. S. 554, 10 Sup. Ct. 1050.

<sup>53</sup> 93 Ill. 580.

that, before attempting to change the links, he should cause the moving cars to halt, and wait until they are at rest, before venturing upon the undertaking."

In *Propsom v. Leatham*<sup>54</sup> the court held that evidence was not admissible to show how the dock there in question compared with the ordinary docks used for shipping lumber and shingles. They very properly say: "The inquiry is not whether the dock was as good as others which were used for like purposes, but whether it was reasonably safe for the defendant's employes to work upon." But this language ought not to be construed as an authority against the admissibility of evidence as to customary methods, for the reason that they were speaking with reference to a dock confessedly defective and obviously dangerous. It requires no argument to prove that one person's negligence cannot be excused upon the ground that others are also habitually negligent and careless in reference to similar acts. The question is evidently different from that where the appliance is not out of repair or obviously dangerous, and the alleged defect consists in the manner of construction.

The same court held, in *Nadau v. White River Lumber Co.*,<sup>55</sup> that evidence showing the custom of other mills in covering exposed gearing was admissible.

#### DEFENDANT'S KNOWLEDGE.

Defendants may show by competent evidence, and may thus testify directly, that they had no knowledge that the premises or machinery were defective or unsafe. The fact that they did not know it would not necessarily be a defense, but they have a right to show that fact, in order to meet the claim of the plaintiff (where such claim is made) that they

<sup>54</sup> 80 Wis. 608, 50 N. W. 586.

<sup>55</sup> 76 Wis. 120, 43 N. W. 1135.

had put the injured servant in a place, or upon or with an appliance, which they knew, or ought to have known, to be defective.<sup>56</sup>

### OPINIONS AS EVIDENCE.

An expert witness cannot state whether, upon a hypothetical state of facts, any particular manner or method is the ordinary, careful, prudent, safe manner of performing the service of the act.<sup>57</sup> Facts must be shown. The jury must reach the conclusion from the facts.

The following cases illustrate the application of this rule, and also generally as to the inadmissibility of opinions of witnesses: Statements of witnesses as to the condition of a gutter, as safe or unsafe, in good or bad condition, are inadmissible.<sup>58</sup> Nor are the opinions of witnesses as to whether a stock car is a dangerous place for a person to ride admissible.<sup>59</sup> Opinions of machinists as to whether a shaft would be more dangerous if jagged and split on the end are not admissible, as the jury are able to decide the question without the aid of experts.<sup>60</sup> Opinions of experts as to whether a certain arrangement of machinery was dangerous are inadmissible, where the facts are such that the jury, after they are explained, are competent to form an opinion.<sup>61</sup> Whether the appearance of machinery would suggest to a prudent man the necessity of an examination is not a question for an expert witness, but is for the jury to determine.<sup>62</sup> Nor is the question whether anything could have been done

<sup>56</sup> Boyle v. Mowry, 122 Mass. 251.

<sup>57</sup> Seliger v. Bastian, 66 Wis. 521, 29 N. W. 244.

<sup>58</sup> Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583.

<sup>59</sup> Lawson v. Railway Co., 64 Wis. 447, 24 N. W. 618.

<sup>60</sup> Kauffman v. Maier, 94 Cal. 269, 29 Pac. 489.

<sup>61</sup> Freeberg v. St. Paul Plow Works, 48 Minn. 99, 50 N. W. 1026.

<sup>62</sup> Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873.



better than was done a proper one for experts.<sup>63</sup> Expert testimony of a yard master that the method of coupling adopted by a servant was careless, dangerous, and not the usual or best way of coupling is inadmissible.<sup>64</sup> Experts cannot testify as to the merits and demerits of whipping straps as signals of low bridges, and state generally whether or not they are generally use on roads regarded as well managed.<sup>65</sup> The latter proposition in the preceding case is in conflict with other well-adjudicated cases. Witnesses cannot give their opinion as to whether a scaffold was put up rightly;<sup>66</sup> nor as to whether it was not more dangerous to ride on a cross beam in front of the engine than on top of the cars;<sup>67</sup> nor as to whether the manner in which a brake was inspected was sufficient;<sup>68</sup> nor as to the skill possessed by an engineer;<sup>69</sup> nor as to whether a person could walk between an obstruction and a building with safety;<sup>70</sup> nor as to whether or not the fencing of the track at the point in question, by putting in cattle guards and using fences, would endanger the safety of defendant's employes;<sup>71</sup> nor as to whether a person could have heard the engine blowing off steam just before the accident, when it does not appear that the witness was either in or near the place where such person was at the time;<sup>72</sup> nor, where the wit-

<sup>63</sup> McLean v. Towboat Line, 52 Hun, 43, 4 N. Y. Supp. 790.

<sup>64</sup> Seese v. Railroad Co., 39 Fed. 487.

<sup>65</sup> Louisville & N. R. Co. v. Hall, 87 Ala. 708, 6 South. 277.

<sup>66</sup> Mauer v. Ferguson (City Ct. Brook.) 17 N. Y. Supp. 349.

<sup>67</sup> Warden v. Railroad Co., 94 Ala. 277, 10 South. 276.

<sup>68</sup> Schneider v. Railroad Co., 133 N. Y. 583, 30 N. E. 752.

<sup>69</sup> Butler v. Railroad Co. (Iowa) 54 N. W. 208.

<sup>70</sup> Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732.

<sup>71</sup> Toledo, St. L. & K. C. R. Co. v. Jackson, 5 Ind. App. 547, 32 N. E. 793.

<sup>72</sup> Chicago, M. & St. P. Ry. Co. v. O'Sullivan, 143 Ill. 48, 32 N. E. 398.

ness is not an expert, as to whether a train could have been stopped in time to have avoided the accident had it been running slower;<sup>73</sup> nor as to whether or not a railway company was ordinarily careful in keeping its track in good condition;<sup>74</sup> nor as to whether it was negligent for an employé of a railroad company to ride on the ladder of a car;<sup>75</sup> nor as to whether, if an engineer had paid attention to signals and stopped his train, an employé would have been killed;<sup>76</sup> nor as to whether an engineer had time to signal the approach of the engine, and whether, had he done so, the deceased would have had time to get off the track;<sup>77</sup> nor as to whether an elevator bin was or was not safe;<sup>78</sup> nor as to whether a witness who heard no signal of an approaching train could have heard it had it been given;<sup>79</sup> nor, on cross-examination of the witness who has stated that he heard no signal, as to whether it might have been given, and he not have heard it;<sup>80</sup> nor as to whether a party was careless at the time of receiving his injury;<sup>81</sup> nor as to whether the backing of the train, causing injury, was done carefully, and without negligence;<sup>82</sup> nor as to whether, at the time of an accident, it occurred to the witness that the

<sup>73</sup> *International & G. N. Ry. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58.

<sup>74</sup> *Ft. Worth & D. C. Ry. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137.

<sup>75</sup> *Johnston v. Railway Co.* (Or.) 31 Pac. 283.

<sup>76</sup> *Kendrick v. Railroad Co.*, 89 Ga. 782, 15 S. E. 685.

<sup>77</sup> *Dowdy v. Railroad Co.*, 88 Ga. 726, 16 S. E. 62.

<sup>78</sup> *Davis v. Railroad Co.*, 69 Hun, 124, 23 N. Y. Supp. 358.

<sup>79</sup> *Eskridge's Ex'rs v. Railway Co.*, 89 Ky. 367, 12 S. W. 580.

<sup>80</sup> *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 South. 813.

<sup>81</sup> *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812.

<sup>82</sup> *Central Railroad & Banking Co., etc., v. Ryles*, 84 Ga. 420, 11 S. E. 499.

accident happened by reason of the darkness, or by reason of plaintiff's inattention to the step being there.<sup>83</sup> Testimony that another company had a similar rule to that of defendant, and that such rule was a safe, proper, and sufficient rule to work upon, is not admissible.<sup>84</sup>

The rule is based upon the ground that where the facts in a case can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them, and draw inferences from them, as witnesses, the opinions of experts cannot be received in evidence as to such facts.<sup>85</sup>

Testimony as to what a witness (an engineer) told a person (who is a witness) as to certain defects causing the accident, and which the engineer denies, is competent as impeaching testimony; but such evidence does not prove, and is insufficient in the absence of other testimony upon the subject to prove, the fact claimed to have been thus admitted.<sup>86</sup>

Whether or not an act was negligence, and whether due care required any particular act, are not matters of expert testimony, but matters of judgment and common experience, except in matters involving skill and science, to be determined by the jury upon the facts and circumstances.<sup>87</sup>

#### — WHEN ADMISSIBLE.

One who is well acquainted with the use of a mechanical appliance, and has had a large experience in using it,

<sup>83</sup> Kelley v. Railroad Co., 80 Mich. 237, 45 N. W. 90.

<sup>84</sup> Nary v. Railway Co., 55 Hun, 612, 9 N. Y. Supp. 153.

<sup>85</sup> Overby v. Railway Co., 37 W. Va. 524, 16 S. E. 813.

<sup>86</sup> Central Railroad & Banking Co. v. Maltsby, 90 Ga. 630, 16 S. E. 953.

<sup>87</sup> Bergquist v. Chandler Iron Co., 49 Minn. 511, 52 N. W. 136.

though not familiar with its construction, is competent to testify as to whether such appliance was reasonably adapted for the purpose for which it was used, and also as to its condition at the time of the accident.<sup>88</sup>

Testimony of an experienced brakeman as to whether the track was a proper place for a brakeman charged with the duty of signaling a train is admissible.<sup>89</sup>

A conductor on defendant's road may testify as to how freight trains are made up on such road, and when the duty of yardmaster ceases, and that of the conductor commences.<sup>90</sup>

A trainman of experience is competent to testify as to whose business it is to make up trains, and as to what conductors generally do when trains are turned over to them.<sup>91</sup>

A trainman of experience is competent to testify as to the effect of a car, heavily loaded or empty, running rapidly over a switch improperly set.<sup>92</sup>

One who has been a conductor of an electric street car for two months is competent to testify within what distance such a car, going at a specified rate of speed, can be stopped.<sup>93</sup>

An expert in dumping cars may testify that the accident could have happened otherwise than by reason of a defect in the car, and that he had seen a car in good order fly back through the fault of those dumping it.<sup>94</sup>

A witness shown to have the requisite skill, and who has

<sup>88</sup> Alabama Connellsville Coal & Iron Co. v. Pitts (Ala.) 13 South. 135.

<sup>89</sup> Helton v. Railway Co. (Ala.) 12 South. 276.

<sup>90</sup> Price v. Railroad Co. (S. C.) 17 S. E. 732.

<sup>91</sup> Price v. Railroad Co. (S. C.) 17 S. E. 732.

<sup>92</sup> Louisville & N. R. Co. v. Mothershed (Ala.) 12 South. 714.

<sup>93</sup> Watson v. Railway Co. (Minn.) 55 N. W. 742.

<sup>94</sup> Donahoe v. Railroad Co., 159 Mass. 125, 34 N. E. 87.

made a personal examination of the place in question where injury was received, may, after describing it, give his opinion as to its dangerous character.<sup>95</sup>

It is proper to allow a witness who has lived near the scene of the accident, and had seen many trains pass, to give his opinion as to how many miles an hour a train was running, though it appeared he did not know how many feet or rods there were in a mile.<sup>96</sup>

Testimony of a plaintiff that a train was coming too fast, and that that was the sole cause of the accident, is admissible.<sup>97</sup>

Where it is impracticable to lay before the jury all the details bearing on the distance a horse car can be seen along a railroad track, the opinions of witnesses may be received.<sup>98</sup>

An expert cannot testify, from all the evidence given, whether the plaintiff was suffering from the injury complained of prior to the accident upon which suit is brought, as this allows the witness to determine what facts are established by the testimony of others, instead of giving only his opinion upon a state of facts assumed by the hypothetical question.<sup>99</sup>

A competent witness may testify as to the difference in danger between using an ordinary road engine as a yard engine, with or without a flat car attached to it.<sup>100</sup>

<sup>95</sup> *McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. 57.

<sup>96</sup> *Ward v. Railway Co.*, 85 Wis. 601, 55 N. W. 771.

<sup>97</sup> *Georgia Railway Co. v. Bryans*, 77 Ga. 429.

<sup>98</sup> *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 South. 813.

<sup>99</sup> *Gregory v. Railroad Co.*, 55 Hun, 303, 8 N. Y. Supp. 525.

<sup>100</sup> *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 South. 145.

## APPENDIX.

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### PREMISES.

It has recently been affirmed by the circuit court of appeals, in an elaborate opinion by Justice Brewer, that the principle which requires the master to provide a reasonably safe place for his servants to do and perform their work applies to maintaining proper fences by a railroad company along its right of way to keep animals from straying from adjoining premises upon its tracks. The contention on the part of the railroad company was that the fence statute was enacted for the benefit of the proprietors of adjoining lands, and did not in any manner affect the liability of the company towards its employes. The court gave full consideration to this proposition, and said: "It is doubtless true that, where a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits. But it does not follow that, when a duty is so imposed, a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute; on the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the vio-

lation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. \* \* \* The purpose of fence laws of this character is not solely the protection of proprietors of adjoining fields; it is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains, and those who are traveling thereon, is the same. To prevent such obstructions being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the company if it fails to comply with this statutory duty. \* \* \* An employe has the same right as a passenger to complain of injuries caused by a violation of duties imposed by such a statute. The purpose is protection to the train. All who are on that train are exposed to equal danger. It is not a case where the employe has the means of protecting himself, and the traveler not; for if the train be derailed, the danger to each is equal. It is urged, however, by the defendant, that the failure to keep the fence in repair is the negligence of a co-employe, and that therefore it is not responsible; but the duty is cast by the statute upon the company, and it is cast as an absolute duty. It must erect and maintain safe and secure fences. It is a duty whose object is the securing a safe place for the employes on the train to do their work; and that, as is known, is an absolute duty cast upon the company, responsibility for neglect of which cannot be evaded by intrusting it to some employe."<sup>1</sup>

<sup>1</sup>Achison, T. & S. F. R. Co. v. Reesman, 60 Fed. 370.

It will be observed that the language of the court makes the responsibility equal as to passengers and employes. Whether it is to be inferred that the measure of care to be observed as to each in maintaining safe and secure fences is the same is a question not made clear. The duty to maintain a safe place for an employe to work is one of the exercise of reasonable care only. Is it to be inferred that the duty in the respect named, on the part of the master, is an absolute one, imposed by statute, and for that reason not a question of the exercise of reasonable care?

The court quotes approvingly from the opinion in *Donnegan v. Erhardt*:<sup>2</sup> "A railroad company, for the safety of its passengers as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid, and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be and come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and, if they do, there is danger that the train may come in collision with them, and be wrecked. Adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find upon the facts of a case that it was the duty of a railroad company to fence its track, to guard against such danger. But, whatever the rule would be independently of the statute, there is no rea-

<sup>2</sup> 119 N. Y. 468, 23 N. E. 1051.



sonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty; and for a violation thereof, causing injury, the railroad company incurs responsibility."

Whether a similar statute created an absolute liability on the part of a railroad company for damages sustained by a neglect to comply with its terms was discussed in *Curry v. Chicago & N. W. Ry. Co.*,<sup>3</sup> and the conclusion was reached that the right of action was for negligence. The rule of absolute liability was said to be "as unwise in policy as unsound in legal construction." It was further said: "And the rule is universal that, in actions for injury by negligence, contributory negligence sufficient in degree will defeat them." This latter proposition is maintained in *Atchison, T. & S. F. R. Co. v. Reesman*, *supra*, which would seem to imply that the absolute duty on the part of the master therein stated was one of the exercise of the proper degree of care.

Still later, in Wisconsin, in construing a particular statute, it was held that the duty on the part of the railroad company to fence within a given time was, by the very words of the statute, absolute, and precluded the defense of contributory negligence or of assumption of the risk; that such effect was in the nature of a penalty, and the regulation was within the police power of the legislature.<sup>4</sup>

<sup>3</sup> 43 Wis. 605.

<sup>4</sup> *Quackenbush v. Railroad Co.*, 62 Wis. 411, 22 N. W. 519. See, also, *Isabel v. Railroad Co.*, 60 Mo. 475; *Barnett v. Railroad Co.*, 68 Mo. 56; *Rutledge v. Railroad Co.*, 78 Mo. 286; *Rozzelle v. Railroad Co.*, 79 Mo. 349.

**APPLIANCES.**

But few courts draw the proper distinction between the method of construction of a machine or appliance and defects in a machine or appliance caused by breakage or use. A complaint can rarely be upheld upon the ground that the appliance is not so constructed as to guard as well as it might against accidents similar to the one, the cause of which may be under consideration. The master is not restricted by law to the character or kind of the machine he shall use. This is a matter for his own selection and judgment. The federal courts, as we have seen, have made this distinction in forcible language. Other courts have as emphatically spoken.

Walsh v. Whiteley<sup>5</sup> was a case where the plaintiff was employed in defendant's mill, and it was his duty to put a band upon a vertical wheel while in motion. The disk of the wheel was not solid throughout, but had a number of holes in it. While putting the band on the wheel, the plaintiff's thumb slipped into one of the holes, and was cut off. It appeared on the trial that these wheels were made sometimes with, and sometimes without, holes. The plaintiff's witnesses stated generally that the wheels with holes were dangerous. The plaintiff never made any complaint to his employer. He recovered a verdict, but the judgment on appeal was reversed; the court saying: "Is there any evidence of the machine being defective, even in the abstract? It was perfect in all respects. It was not impaired by use. The only suggestion is that the wheel, which might have been made solid, had holes in it, and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have hap-

<sup>5</sup> 21 Q. B. Div. 371.

pened. But the plaintiff had used the same kind of a machine for thirteen years, and had sustained no injury. In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from the negligence of the employe. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery."

*Sweeney v. Envelope Co.*<sup>6</sup> was a case where the plaintiff was injured by some sort of a press worked by steam. It was old-fashioned, and with no modern improvements. The court said: "He knew as much about it, and the risk attending its use, as the master. The defendant could not be required to provide himself with other machinery or with new appliances, nor elect between the expense of doing so and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability for injuries arising from its use. The general rule is that the servant accepts the service subject to the risks incidental to it; and when the machinery and implements of the employer's business are, at that time, of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards."<sup>7</sup>

In *Schroeder v. Car Co.*<sup>8</sup> the supreme court of Michigan, per Cooley, J., said: "From this state of facts [after reciting the facts] it will appear that, if the defendant has been guilty of any negligence contributing to the injury, it is to be found in the fact that a machine is made use of

<sup>6</sup> 101 N. Y. 520, 5 N. E. 358.

<sup>7</sup> See, also, *Hodgkins v. Railroad Co.*, 119 Mass. 419.

<sup>8</sup> 56 Mich. 132, 22 N. W. 220.

which is not so constructed as to guard as well as it might against similar accidents. Had the machine been constructed with a shield over the cogwheels, this particular accident would probably not have occurred; and any one whose attention was drawn to the danger of such accidents would probably have perceived the desirability of such a shield. But the machine is shown by the evidence to be manufactured and sold by a prominent and reputable house, and much used throughout the country, and the defendant cannot be said to be exceptionally wanting in prudence in purchasing and making use of it."

In *Southern Pac. Ry. Co. v. Seley*<sup>9</sup> the supreme court of the United States approve of the doctrine of the foregoing cases, and apply it to a case of an employe who was injured by reason of an unblocked frog. They say: "It was not pretended, in the present case, that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of a frog, not much used, and which, if used by the defendant, might have prevented the accident." The court held that, upon the whole evidence (the plaintiff's knowledge appearing), a verdict for the defendant should have been directed.

<sup>9</sup> 152 U. S. 145, 14 Sup. Ct. 530.



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